SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 127

WILLIAM MONKS,

Petitioner,

—v.—

NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Juvenile and Domestic Relations Court of Passaic County adjudicating petitioner a delinquent and committing him to the New Jersey Reformatory at Bordentown for an indeterminate term is unreported. It appears in the Appendix [hereafter cited as A....], at A. 213-217.

The subsequent action of the Juvenile and Domestic Relations Court determining the nature of the offenses for which petitioner had been adjudicated delinquent, for the purpose of establishing the maximum duration of his con-

finement, took the form of a letter from the juvenile judge to the reformatory superintendent. It is unreported and appears at A. 222.

The opinion of the Superior Court of New Jersey, Appellate Division, affirming these actions of the Juvenile Court, is unreported and appears at A. 224-229.

The order of the Supreme Court of New Jersey denying certification of the judgment of the Superior Court was rendered without opinion. That order appears at A. 230.[1]

Jurisdiction

The Supreme Court of New Jersey denied certification on May 28, 1968. The petition for a writ of certiorari was filed on August 19, 1968, and was granted by this Court on May 19, 1968. The jurisdiction of the Court rests upon 28 U.S.C. § 1257(3) (1964), petitioner having asserted be-

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[1] Petitioner's *pro se* petition for *certiorari* asked that the writ be directed to the Supreme Court of New Jersey, and this Court's order granting review was phrased in those terms. However, under New Jersey practice, allowance by the State's Supreme Court of certification of a final judgment of the Superior Court, Appellate Division, is discretionary, N.J. SUPREME COURT RULE 1:10-2, RULES GOVERNING THE NEW JERSEY COURTS (1968), and in this case the Supreme Court of New Jersey denied petitioner's application for certification (A. 230). Under those circumstances, this Court's writ should properly run to the Superior Court, *Virginian Ry. Co.* v. *Mullens*, 271 U.S. 220, 222 (1926); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Rock*, 279 U.S. 410, 411-412 (1929); *Callender* v. *Florida*, 383 U.S. 270 (1966); *Lee* v. *Florida*, 392 U.S. 378 (1968); and counsel, in this Brief, has accordingly styled the proceedings as "On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division." Of course, the time fixed by law for a *certiorari* petition runs, in any event, from the date of action by the New Jersey Supreme Court, *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Smith* v. *Illinois*, 390 U.S. 129 (1968), so the petition herein was timely filed.

low and asserting here the deprivation of rights secured by the Constitution of the United States.

Questions Presented[2]

1. Were petitioner's confessions to the police involuntary, and did their admission into evidence therefore violate his rights under the Fifth and Fourteenth Amendments?

2. Petitioner was charged and tried on allegations of delinquency at a time when, by New Jersey law, (i) an adjudication of delinquency could be based upon any crime committed by a child of petitioner's age, and (ii) in consequence of any adjudication of delinquency, the child could be committed for the maximum term of his natural life. Subsequent to his being adjudged delinquent and committed, retroactive legislation limited the maximum period of juvenile commitments to a child's minority—that is, it required release of the child upon his twenty-first birthday—except in cases where the adjudication of delinquency was predicated upon the commission of a homicide. In homicide cases, the maximum duration of confinement was to be the maximum sentence of imprisonment allowed by law to be imposed upon adults convicted of the applicable degree of homicide. After the effective date of the new legislation, petitioner's reformatory superintendent asked the juvenile court that had committed him to determine the character of his offenses. Following a conference with

[2] Questions arising from New Jersey's denial of a jury trial in juvenile cases, raised by the petition for *certiorari*, are not briefed herein because, upon inspection of the record, it appears that they were not properly presented below. Cf. *DeBacker* v. *Brainard*, O.T. 1969, No. 15, decided November 12, 1969.

petitioner's court-appointed counsel, but without notice to petitioner himself and in his absence, the juvenile court determined that petitioner's adjudication of delinquency was based in part upon acts constituting first degree murder, and accordingly the maximum duration of his commitment was a life term. Under these circumstances, was petitioner denied due process of law in that:

A. He was tried without fair notice of issues which determined whether he would be sentenced, in effect, to five years imprisonment or to life imprisonment; and

B. His effective sentencing to life imprisonment was done *in absentia* and without personal notice to him?[2]

Constitutional and Statutory Provisions Involved

This case involves the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

It also involves the following New Jersey statutes.(1) N.J.S.A. § 2A:4-14, defining the jurisdiction of the juvenile court to adjudicate children delinquent; (2) N.J.S.A. § 2A:4-37 (both before and after its amendment effective January 6, 1958), governing the maximum duration of

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[2] Because the Petition for a Writ of Certiorari was filed *pro se*, counsel has taken greater liberty than would ordinarily be warranted in rephrasing one of the questions presented by the Petition. Question 1 in the Brief is essentially identical to Question 5 of the Petition; and we submit that Question 2 in the Brief is fairly subsumed within Questions 1, 2 and 4 of the Petition (see also pages 8-9 of the Petition). In any event, the phrasing of a certiorari petition does not delimit this Court's jurisdiction, and it would be manifestly unjust to hold a *pro se* petitioner to the terms of his uncounseled legal formulations in a case where he has solid grounds of constitutional attack upon a juvenile commitment amounting to a life sentence.

juvenile court commitments; and (3) N.J.S.A. § 2A:113-4, fixing the penalty for the crime of first degree murder.

These New Jersey provisions are set out, in order of their listing above, in Appendix A, pp. 77-80, *infra*.

Statement of the Case

A. Legal Background

The offenses giving rise to charges against petitioner occurred in 1956; his trial, in 1957. During those years, as now, New Jersey had the common form of juvenile court legislation, conferring exclusive jurisdiction on the Juvenile and Domestic Relations Court to adjudicate all cases of juvenile delinquency. Juvenile delinquency was defined as including, *inter alia*, the commission by a child younger than 18 of any act which, if committed by a person 18 or older, would be a "felony, high misdemeanor, misdmeanor, or other offense," or a "violation of any penal law."[4]

The juvenile court's dispositional powers, in the event of an adjudication of delinquency, were defined by statute. They included placement on probation, commitment to the custody of the state board of child welfare, and commitment "to a public institution established for the care, custody, instruction and reform of juvenile offenders or to any other appropriate institution which is maintained by

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[4] N.J.S.A. § 2A:4-14 (1952), App., p. 77, *infra*. These provisions, in effect in 1956-1957, were carried forward unchanged by N.J. Laws 1959, ch. 73, p. 188, § 1, N.J.S.A. § 2A:4-14 (1969 Cum. Supp.). Provisions authorizing the waiver of the exclusive jurisdiction of the juvenile court in certain situations, N.J.S.A. § 2A:4-15 (1952), are not material to the present controversy.

the state or [an affected] ... county or ... municipality," or "to any other like institution, commitment to which may be authorized by law."[5]

Institutional commitments of juveniles made under these provisions were for an indeterminate term. New Jersey statutes did not expressly limit the maximum duration of confinement to the child's minority. The New Jersey Supreme Court, in 1955, refused to find any such limitation implied in the juvenile jurisdiction; it held, in effect, that juvenile commitments were for a life term, subject to parole at any time.[6]

B. History of Proceedings

March 1, 1957, petitioner William Monks was fifteen years and four months old. (A. 6, 101.) On that day, two

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[5] N.J.S.A. § 2A:4-37 (1952), App., p. 78, *infra*. These dispositional alternatives remain available under the 1958 amendment to § 2A:4-37, App., p. 79, *infra*, whose effect was only to delimit the maximum duration of confinement allowed under juvenile commitments of the described sorts.

In 1956-1957, as now, the only New Jersey State correctional facilities for male children were the State Home for Boys at Jamesburg and the New Jersey Reformatory, with installations at Bordentown and Annandale. N.J.S.A. §§ 30:1-7, 30:4-146, -147, 30:4-156 (1964). *See In re Smigelski*, 30 N.J. 513, 521, 154 A.2d 1, 5 (1959). The Reformatory was also authorized to receive adult offenders convicted of the most serious crimes—State Prison offenses—provided only that they were less than 30 years of age and had not previously been sentenced to a state prison or reformatory term. N.J. Laws, 1957, ch. 93, p. 181, § 2 (amended in 1963 so that now only a previous state-prison sentence makes a convict under 30 ineligible for commitment to the Reformatory, N.J.S.A. § 30:4-147 (1964)). Juvenile or adult inmates of the Reformatory, 18 years of age or older, could be transferred to the State Prison upon specified administrative findings. N.J.S.A. §§ 30:4-85, 30:4-90 (1964).

[6] *Johnson* v. *State*, 18 N.J. 422, 114 A.2d 1 (1955). See *In re Smigelski*, 30 N.J. 513, 521-526, 154 A.2d 1, 5-7 (1959); *In re State in the Interest of Steenback*, 34 N.J. 89, 99-101, 167 A.2d 397, 402-403 (1961).

petitions were filed in the Juvenile and Domestic Relations Court of Passaic County, seeking to have him adjudged a delinquent child. The first alleged that, on November 12, 1956, "while in the commission of an assault and robbery, he struck Giovanna Giambra . . . on the head, with a blunt instrument on repeated occasions, which resulted in her death." (A. 3.) The second alleged that, on February 24, 1956, "he did forcibly strike Naomi Weiss . . . on the head with a blunt instrument causing a deep laceration . . . and resulting in her hospitalization . . . ; and further, that he did steal and carry away her pocketbook" containing valuables. (A. 5.)

The two petitions came on for trial together beginning December 3, 1957. (A. 6.) Petitioner denied their allegations (A. 7), and testimony was taken before a juvenile court judge.

As detailed more fully in the following subsections, the prosecution's case consisted in major part of confessional evidence: principally oral and written statements taken from petitioner by police; and reenactments by petitioner of the Giambra and Weiss assaults, photographed by a police photographer. Petitioner asked for a preliminary examination on the question of voluntariness of the statements (A. 8, 29, 84-85, 100; Tr. I, 77; II, 212-213),[7] and the court agreed to hear testimony on that issue (A. 9, 85.) His repeated objections to admission of the signed statements on the ground that they had been involuntarily extracted were later broadened to include petitioner's oral admissions to police as well. (A. 63.) He objected on the

[7] Tr. —— refers to the transcript of testimony taken at petitioner's trial, contained in the original record before this Court. It is in three volumes. Tr. I, —— refers to the transcript of December 3, 1957; Tr. II, —— refers to the transcript of December 4, 1957; Tr. III, —— refers to the transcript of December 5-11, 1957.

same grounds to admission of the reenactment photographs (A. 21-22, 39-41, 43-48, 63), and the court heard evidence on the voluntariness of the reenactments. (A. 22.) All of these defense objections were overruled, and the court admitted first the photographs (A. 43-48) and then the confessional statements (A. 105-106). During the trial, it made a provisional ruling that petitioner's confessions were voluntary, while leaving the record open for further defense testimony on the issue. (*Ibid.*) At the close of all the evidence, it again held the confessions voluntary and admissible. (A. 213-214, 216-217.)

The trial continued with several adjournments through December 11, 1957, on which date the court announced its oral opinion finding petitioner guilty of both the Giambra and Weiss offenses, adjudging him a delinquent, and committing him to the Reformatory at Bordentown for an indeterminate term. (A. 213-217.)

January 6, 1958, an amendment to the New Jersey juvenile court legislation was enacted. This provided that:

> "the time which any . . . child [adjudged delinquent by the juvenile court] shall serve in confinement or on parole shall not extend beyond that date upon which the child attains the age of 21 years, except, that if the adjudication of juvenile delinquency is predicated upon an offense which, if committed by a person of 18 years or over, would constitute any form of homicide . . . then the period of confinement shall be indeterminate and shall continue until the appropriate paroling authority determines that such person should be paroled, but in such case the period of confinement and parole shall not exceed the maximum provided by law for such offense if committed by a person of

> the age of 18 years or over . . . ." (N.J. Laws 1957, ch. 220, p. 765, §1, N.J.S.A. § 2A:4-37 (1969 Cum. Supp.), App., p. 79, *infra.*)

April 11, 1958, the Superintendent of the Bordentown Reformatory wrote to the Juvenile and Domestic Relations Court of Passaic County, calling attention to this new legislation and asking the court to determine the nature of the offenses for which petitioner had been adjudged delinquent and committed, for the purpose of fixing the maximum term of his confinement. (A. 220-221.)

The court served copies of the Superintendent's letter upon the prosecutor and upon petitioner's court-appointed trial counsel, "constituting this as a form of notice of motion." (A. 222.) April 21, 1958, all counsel appeared before the court and, in petitioner's absence, discussed the matter. (A. 222.) The upshot of the conference was a letter dated May 2, 1958, addressed by the court to the Reformatory Superintendent, stating that, "to assist you in fixing the maximum sentence," petitioner's adjudication of delinquency in the Giambra matter was "based upon facts constituting murder in the first degree," while his adjudication of delinquency in the Weiss matter was "based upon facts constituting robbery and atrocious assault and battery." (A. 222.)

The maximum term of imprisonment authorized by New Jersey law for the crime of first degree murder is life. N.J.S.A. § 2A:113-4 (1953). The next document in this record relating to petitioner's case is an administrative form, dated May 31, 1967, reflecting his transfer from the Bordentown Reformatory to the New Jersey State Prison and containing the following entries:

"ORIGINAL MAXIMUM: Life.

"OWES ON THIS TERM: Life." (A. 223.)

On January 23, 1958, petitioner's appointed counsel had filed a notice of appeal to the Superior Court, Appellate Division.[8] For reasons that do not appear in this record, that appeal was not perfected for almost ten years. Shortly after his transfer to State Prison, petitioner filed in the Superior Court a *pro se* application seeking leave to prosecute a delayed appeal *in forma pauperis*.[9] The Superior Court granted the application on August 21, 1967.[10]

New counsel appointed for petitioner urged, *inter alia*, that petitioner's confessions were involuntary and that the determination of his maximum sentence in 1956 to be "the same as though he were convicted and sentenced as an adult" was "contrary to the entire statutory scheme for the treatment and rehabilitation of juvenile offenders."[11] March 27, 1968, the Superior Court rejected these contentions and sustained both petitioner's adjudication of delinquency and his "confinement at State Prison for life" (A. 228). (A. 224-229.) It found that petitioner's confessions "were voluntarily made and were obtained under circumstances fundamentally fair." (A. 226.) The fixing of petitioner's maximum term at life imprisonment was ap-

[8] The notice is found at p. 4a of the Brief and Appendix of Defendant-Appellant filed in the Superior Court, Appellate Division, and contained in the original record before this Court.

[9] The application is not contained in the record. The date of its filing, August 15, 1967, is recited in the Superior Court's order granting the application, note 10 *infra*.

[10] Brief and Appendix of Defendant-Appellant, *supra* note 8, at 6a.

[11] *Id.* at 28-29.

proved on authority of *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959), which had rejected contentions that the 1958 amendment to the juvenile court laws "was *ex post facto* and, hence, illegal as to a sentence imposed before its effective date." (A. 229.)

Appointed counsel petitioned the New Jersey Supreme Court for certification of the judgment of the Superior Court. His petition challenged both of the holdings of the Superior Court just described. It also appended a *pro se* petition drafted by the petitioner, which asserted *inter alia*, that "the juvenile judge had no jurisdiction to change defendant's sentence from an indeterminate one for juvenile delinquency to life for homicide, particularly in the absence of defendant."[12] The New Jersey Supreme Court denied certification on May 28, 1968. (A. 230.)

A *pro se* petition for *certiorari* was filed on August 19, 1968, and granted by this Court on May 19, 1968 (A. 231).

C. The Case Against Petitioner

1. *The Weiss and Giambra Assaults*

Shortly after 10:00 p.m. on February 24, 1956, Miss Naomi Weiss was walking on East 31st Street near 13th Avenue in Paterson, New Jersey. (Tr. I, 48.) She heard footsteps approaching her from the rear, crossing 31st Street diagonally behind her right shoulder. (Tr. I, 49, 52-54.) She was struck down from behind and her purse was taken. (I, 49-50, 58-59.) A dress box that she carried was not taken. (I, 50, 59-61.) As a result of this assault,

[12] This passage appears at p. 12a of the appendix to Petition for Certification and Supplemental Appendix filed in the Supreme Court of New Jersey and contained in the original record before this Court.

Miss Weiss suffered a deep 2- or 3-inch head laceration (Tr. I, 58-59), entailing a skull fracture and a brain contusion that required her hospitalization for about a month (Tr. I, 12-14). She did not see her assailant. (Tr. I, 54.)

Shortly after 8:00 p.m. on November 12, 1956, Miss Giovanna Giambra left her home on East 23rd Street in Paterson (Tr. II, 287) to go to a church meeting (Tr. II, 291). She was carrying a black pocketbook. (Tr. II, 288.) Between 8:20 and 8:30 p.m., a nun residing in a convent near the church at 14th Avenue and Wall Avenue heard a scream. (Tr. III, 58.) At 8:32 p.m., a motorist observed a woman's body lying bleeding in the roadway of Wall Avenue near the church. (Tr. III, 85-86.) Policemen responding to a call at 8:35 p.m. found Miss Giambra lying in the middle of Wall Avenue bleeding from the head. (Tr. III, 38-40, 47-48.) Questioned by the officers, she said a man was following her; she heard footsteps, turned, saw a man with a dark leather jacket; he struck her; she didn't know why. (Tr. III, 42.)

Miss Giambra suffered two lacerations on the right side of her head (Tr. III, 49-50, 52), indicating two blows of a heavy blunt instrument. (III, 54.) She subsequently died as a result of multiple compound fractures of the right front and parietal bones and adjacent hemorrhaging. (Tr. III, 50-51.) Her black purse was missing, and was never found. (Tr. III, 266.)

2. *Evidence Identifying Petitioner as the Assailant: Petitioner's Confessions*

Apart from confessional statements made by the petitioner, there is no evidence of any consequence identifying him as the assailant in the Weiss and Giambra mat-

ters.[13] The case against petitioner stands entirely upon his confessions.

Petitioner made several confessions to the Weiss and Giambra assaults. The most important of these are the ones whose voluntariness and admissibility were challenged below, specifically: (1) an oral confession of the Weiss assault, made to several police officers at 4:30 p.m. on February 26, 1957; (2) a reenactment of the Weiss assault made immediately following that confession, ending, however, in a recantation of the confession between 5:00 and 6:00 p.m. on February 26; (3) two oral confessions of the Giambra assault made to the same officers sometime after 8:00 p.m. on the same day; (4) formal confessions of both assaults transcribed and signed between 10:45 p.m., February 26 and 1:00 a.m. the following morning; and (5) reenactments of both assaults photographed by a police photographer on the morning of February 27. Evidence of other confessional statements was also presented by the prosecution, but these were relatively unimportant or were clearly derivative of the major confessions just described.[14]

Petitioner's major confessions purported to recite in detail how he assaulted and robbed Miss Weiss and Miss Giambra, striking them on the head with a piece of metal and snatching their pocketbooks.[15] The stories he told con-

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[13] Appendix B, pp. 81-82, *infra*, collects and discusses the prosecution's non-confessional evidence of identity.

[14] The other confessions are identified and discussed in Appendix C, pp. 83-85, *infra*.

[15] The substance of the oral confession relative to the Weiss assault made at 4:30 p.m. on February 26, 1957, appears at A. 14-16, 74, 117-119. The reenactment and recantation of the Weiss assault, between 5:00 and 6:00 p.m. are described at A. 17-18. The oral confessions made in the Giambra matter following 8:00 p.m.

form for the most part to the known circumstances of the attacks.[16] But they contain a number of puzzling internal inconsistencies, and are discrepant from the events of the attacks in significant regards.[17] The trial judge concluded that petitioner's "statement doesn't appear to be accurate in every detail, but in the basic essential facts it's accurate." (A. 214.) Conceding all due respect to this finding, we suggest that an examination of the portions of the record collected in Appendices D and E *infra* gives considerable color to petitioner's trial testimony that his confessions were constructed in response to the accusations and demands of his interrogators—reflecting any facts they told petitioner about the Weiss and Giambra assaults, and including filler matter, often inaccurate, to round out the details.

Of course, because petitioner's interrogation was conducted by several police officers and a polygraph operator in the absence of any impartial witness,[18] it is not now possible to know reliably how much of his confessions originated with him, and how much was suggested by the police. But the twistings and turnings of petitioner's narratives—his changing of tales, his recantations and re-

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are described at A. 19-20, 135-138. The formal, signed statements taken between 10:45 p.m. February 26 and 1:00 a.m. February 27 are Exhibits S-5 and S-6, read into the record at A. 106-114. The reenactment later in the morning of February 27, is described at A. 21, 44-48, 130-134; and photographs taken of it were received as Exhibits S-7 through S-18.

[16] Appendix D, pp. 86-88, *infra*, discusses each of the aspects in which petitioner's confessions comport with, and are corroborated by, the circumstances of the offenses.

[17] Appendix E, pp. 89-91, *infra*, describes these inconsistencies and discrepancies.

[18] This assertion does not ignore Mr. Jarmolowicz, of whom more will be said *infra*.

confessions—his heedlessness (if not ignorance) of the true details of the offenses to which he was confessing, surely, bespeak considerable pressure generated by the circumstances under which his confessions were made.

We turn now to those circumstances. In reading the following account of them, the Court should have in mind that petitioner was, at the time of his arrest, *incommunicado* confinement, interrogation and confession, a grammar school child (A. 101),[19] fifteen years and four months old. (A. 6, 58.)

3. *The Circumstances Under Which Petitioner's Confessions Were Made*[20]

a. Chronology

On November 15, 1956, three days after the Giambra attack, petitioner was picked up by police and questioned about that offense. The record reveals little about the nature of the questioning. Apparently, petitioner was taken to the second floor of a police station, interrogated for about an hour, and released.[21]

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[19] Uncontradicted defense testimony.

[20] The following statement is based almost entirely upon police testimony. At a very few points, uncontradicted defense testimony is used to fill gaps in the police version of the events; but, whenever this is done, an explicit note is made of reference to a defense witness.

[21] There are only two references in the police testimony to the events of November 15. Officer Mahull testified that he went looking for petitioner on that day, in the course of "investigating anyone of any suspicious nature at all that lived in the area" (Tr. I, 66) of the offense. His testimony makes clear that he was out to pick up petitioner; but it stops short of the point at which he, or another officer, took petitioner into custody. (Tr. I, 65-68.) How-

Three months later, Detectives Meola and Spazante took petitioner into custody in connection with two purse snatchings that occurred on February 15, 1957. (A. 49, 208.) They awakened him from his sleep at about 1:00 a.m. the morning of February 16 (A. 209; see also A. 49, 208),[22] got him dressed, and took him to the police station (A. 209). After an hour and a half at the station, the officers took petitioner out to dig up the buried purses involved in the February 15 snatchings. (*Ibid.*) These purses were recovered at about 3:30 a.m. (*Ibid.*) After 3:30, the officers continued to question petitioner until about noon the following day. (A. 209-210.) The questioning, described as "on and off," concerned a series of burglaries, bicycle thefts and larcenies from automobiles in petitioner's neighborhood. (A. 210.) Petitioner was not in custody in connection with the Weiss or Giambra offenses at that time (A. 49), and the police deny that he was questioned about those offenses on February 16 (A. 208, 210).[23]

From shortly after 1:00 a.m., February 16, 1957 until his confessions ten days later, petitioner was held in con-

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ever, Detective Ventimiglia testified that petitioner was, in fact, questioned during the Giambra investigation. (A. 13, 78.) In this state of the record, it seems appropriate to refer to the uncontradicted testimony of petitioner and his father that petitioner was picked up by police at about 4:00 p.m. on November 15; that he was taken to the police station and questioned on the second floor by one or two officers for about an hour; and that he was then permitted to go home, arriving between 6:00 and 7:00 p.m. (A. 198-199; Tr. 111, 191.)

[22] At the time he was taken into custody, he was not living with his parents, but with a couple named Wramage. (A. 79, 208.)

[23] Petitioner's testimony conflicts with that of the officers in this regard. (A. 190.)

finement.[24] Except when he was being interrogated by the police, he was confined in the Children's Shelter.[25]

On February 18, Detectives DeSimone and Ventimiglia decided to question petitioner about the Giambra case. (A. 127-128.) They had been working on that unsolved case for some time; they knew that the Giambra pocketbook had never been found; and their attention was called to petitioner when they read of his connection with subsequent purse snatchings in which the purses had been buried. (*Ibid.*) The two officers accordingly went to a judge of the juvenile court, Judge Schamach, to ask his permission to question petitioner. (A. 128.) The judge gave them permission, provided that petitioner was to be questioned by the detectives only in the presence of Probation Officer Jarmolowicz. (A. 13, 98, 128, 158.)

At about 2:30 p.m. on February 18, DeSimone and Ventimiglia questioned petitioner for about an hour at the Children's Shelter, in the presence of Mr. Jarmolowicz. (A. 12-13, 48-50, 69-70, 82.) DeSimone testifies:

> "We walked into the room, introduced ourselves—he knew Jarmolowicz, I believe—we introduced our-

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[24] Police testimony is explicit that petitioner was in confinement between February 18 and February 27. (A. 70.) The question to which this testimony responds was not asked in terms that included the period between February 16 and February 18. But because the police admit taking petitioner into custody at 1:00 a.m. on February 16 (text, *supra*), and because no police testimony suggests that he was ever thereafter released, we take as uncontradicted petitioner's assertion (A. 101-102) that he was in confinement from February 16 through February 27, inclusive.

[25] The police testimony implies, although it does not explicitly state, that petitioner's place of confinement throughout these 10 days was the Children's Shelter. (*E.g.*, A. 12, 52-53, 78, 114, 159; see also Tr. 111, 72.) Petitioner's uncontradicted testimony makes the point explicit. (A. 101-102.)

selves and Ventimiglia started talking. The theme of it was, 'Willy, we heard you are in on these crimes. Now, who put you up to this? Who taught you how to steal bags? Who told you to bury them?' and things like that. He said, 'Nobody, nobody, man.' Every other word was 'man,' very surly, and every other word was 'man.' 'Oh, come on, you are only a pup, who put you up to it?' 'No one.' So then I got into the conversation. I said, 'Willy, did you ever take any other bags in that general area?' He says, 'Yes, I guess so.' I says, 'Willy, let's try to pinpoint some of these other thefts. Let's start back with 25th Street. Did you ever take a bag along 25th Street?' I proceeded to 26th, on some of them he said, 'Yeah, I think I took one there.' I didn't elaborate. 'How about 27th, 28th, 29th, 30th?' At this point he said, 'I didn't hit that woman.' I said, 'What woman?' He says, 'The Weiss woman, the one who was hit by the hospital.' So I said, 'When did that happen?' He says, 'About a year ago.' I dropped it right there.

"'How about 32d Street, 33d Street?' We got varied answers. 'Wall Avenue?' 'I didn't hit that girl.' 'What girl?' 'The Giambra girl.' 'When did that happen, Willy?' 'November 12.'

"I said, 'Willy, how do you remember that date?' He says, 'Oh, I don't know, I saw it in the paper.' I said, 'Where were you that night?' 'Oh, I was on the corner of 15th Avenue and 22nd Street in the candy store.' I said, 'How do you remember Weiss?' He says, 'Oh, I read it in the paper,' he says, 'It was snowing.' I think he made reference at this point that it was snowing that night, so we dropped it right there. So we asked him one or two questions in that vein, 'How

> do you remember this?' Then I asked him, I said, 'Willy, are you willing to take a lie detector test if permission is granted by the court?' He said, 'Oh, sure, they are fake, they can't tell you nothing.' I said, 'We are only interested if you are interested. Are you willing to take one?' He said, 'Sure, I will take it. . . .'" (A. 128-129; see also A. 42.)[26]

Ventimiglia's description of the interrogation is roughly similar (see A. 12-13, 69-70, 72-73), although with significant differences of detail.[27] Ventimiglia says that petitioner "denied any previous purse snatchings" (A. 13) prior to his street-by-street inquisition. Also, Ventimiglia remembers that petitioner at one point

> ". . . interjected that we were questioning him primarily because of the Giambra case and he said, 'I was already questioned on that and I have an alibi and I was picked up by the police and I told the police that I had been in a luncheonette at the corner of 15th Avenue and 22nd Street.'" (A. 13.)

But Ventimiglia agrees with DeSimone that "We asked Bill Monks then and there if he would submit to a lie detector test and he said he would." (A. 13.)[28]

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[26] DeSimone's testimony at A. 42 does not make clear the date of the interrogation it describes; but Detective Ventimiglia dates that interrogation on February 18, and the prosecutor so stipulates, at A. 69-70.

[27] As quoted above, DeSimone has petitioner volunteer the information that Miss Weiss was attacked near the hospital. In Ventimiglia's version, the detective asked petitioner "whether he ever snatched a bag from a woman near the hospital." (A. 13.)

[28] Responsive to a leading question by the court, petitioner testified below that he, not the police, originated the suggestion of a lie detector test. (A. 212.) This was flatly denied by DeSimone

Several days were required to arrange for the lie detector test (A. 99-100, 129), and petitioner was not questioned on February 19 or 20 (A. 51, 99-100, 129, 159). On February 21, Mr. Jarmolowicz brought petitioner from the Children's Shelter to the anteroom of the Grand Jury room in the Court House for a polygraph examination. (A. 14, 52, 55, 77, 159.) The test was conducted by Mr. Richard Arther, director of the New York office of John E. Reid and Associates. (A. 19, 55.) Detectives DeSimone, Ventimiglia and Meola met Jarmolowicz and petitioner at the courthouse and turned petitioner over to Mr. Arther. (A. 52.)[29] Arther was alone with petitioner during the polygraph test itself. (*Ibid.*) At 4:00 p.m., "the boy was put on the machine in the first of three series." (*Ibid.*)

The series ran until 5:30 p.m. (A. 52.)[30] Petitioner was driven back to the Children's Shelter by DeSimone and Jarmolowicz, arriving prior to 6:30 p.m. (A. 52-53, 159.)[31]

Sometime after his polygraph session with petitioner on February 21, Mr. Arther "requested that no one interrogate William Monks until he had a chance to carry out further tests, and that request was abided by." (A. 33.)[32]

(A. 212-213), and is inconsistent with the several police descriptions of the conversation cited in the text.

[29] None of the detectives themselves questioned petitioner on February 21. (A. 14, 52, 53, 70, 83.)

[30] Mr. Jarmolowicz testifies that petitioner was in the room with the polygraph operator for only 30 or 40 minutes (A. 159) rather than for the one-and-one-half hours reflected in Ventimiglia's notes. This is an instance of Jarmolowicz's persistent tendency to careless recollection, discussed in text, *infra*.

[31] However, Ventimiglia elsewhere testifies that *he* returned petitioner to the Children's Shelter on February 21. (A. 78.)

[32] The request is described somewhat more specifically at A. 62 as a request "[n]ot to question him concerning the commission of these two crimes."

No detective saw petitioner between February 21 and February 26. (A. 53, 99-100, 159.) On the latter date, Mr. Arther was again available. So, on February 26, petitioner was again brought to the Court House, where he was held all day and all night and was "tested" and interrogated until he confessed.

Between 9:00 and 9:30 a.m. on the 26th, Probation Officer Jarmolowicz took petitioner from the Children's Shelter. (A. 88, 159-160.) The two arrived at the Court House at about 10:00 a.m., and were joined outside the prosecutor's office by Detectives DeSimone, Ventimiglia and Meola. (A. 30, 53, 159-160.) The detectives and Jarmolowicz led petitioner to the anteroom of the Grand Jury Room where Mr. Arther had once again set up his polygraph equipment. (A. 30.) They had no conversation with petitioner (A. 30-31), but "turned him over to Mr. Arther who' . . . proceed[ed] to test him" (A. 30; see also A. 160).

Petitioner was tested and interrogated by Mr. Arther for 1½ or 2½ hours, emerging from the anteroom shortly after noon. (A. 31.)[33] During these hours, petitioner was alone with Mr. Arther. (A. 30, 33, 87, 160.) The anteroom door was secured (A. 31), and the detectives, with Mr. Jarmolowicz, waited nearby in the hall or the Grand Jury Room (*ibid.*).

After the session with Mr. Arther, petitioner was brought into the Grand Jury Room where he, Mr. Jarmolowicz and the three detectives ate a lunch consisting of coffee and

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[33] Jarmolowicz testifies that this session ran twenty to thirty minutes (A. 160), rather than about two hours. His testimony is inconsistent with the detectives', and would leave a gap of at least 1½ hours in his own narrative of the day's events. This is another instance (see note 30 *supra*) of Jarmolowicz's testimonial carelessness. (See text, *infra*.)

sandwiches. (*Ibid.*) None of the officers talked with petitioner during lunch. (*Ibid.*) "[T]hen there was a delay and we allowed him to sit over in a corner and we conferred with Mr. Arther and as a result Harry Ogg [a neighborhood friend of petitioner's][34] was brought in at approximately 2:30." (*Ibid.*) Ogg was taken into the anteroom with Arther and tested on the polygraph during a period of twenty minutes or a half hour. (A. 32, 59.) During this period, petitioner remained in the Grand Jury Room with the detectives and Mr. Jarmolowicz. (A. 32, 160.) Again, during the periods of waiting for Ogg and of Ogg's testing, no one in the room talked to petitioner. (A. 32.)

After the test on Ogg was completed, petitioner was brought into the anteroom and "confronted . . . with Ogg." (A. 32, 79.) Ogg said to petitioner that petitioner had admitted commission of the Weiss assault to Ogg.[35] (A. 79-80.) Petitioner said nothing. (A. 80.) He was in the room with Ogg only a few minutes. (A. 33.) Then Mr. Arther conducted another half-hour polygraph examination of petitioner, while the detectives and Mr. Jarmolowicz again waited in the hall or in the Grand Jury Room. (*Ibid.*)

Petitioner was brought from the anteroom back to the Grand Jury Room at "around 3:30 or 4:00 o'clock, thereabouts." (*Ibid.*) "When he came out, as a result of what Mr. Arther told us we began questioning him. . . ." (*Ibid.*) "[W]e interrogated him" from about 3:30 until shortly after 4:00. (A. 34; see also A. 14-16, 23-24.) "[T]he interrogation . . . didn't last no longer than a half hour to

[34] See Appendix C, para. A(1), *infra*.

[35] See Appendix C, para. A(1), *infra*.

three-quarters of an hour, and at 4:00 o'clock, I believe it was, that is the first time that he told us any story about any assault on Miss Weiss." (A. 34; see also A. 23.) (However, at another point in his testimony, the same detective fixes the beginning of this period of interrogation at approximately 3:00 p.m. (A. 148); and another detective testifies that petitioner's confession came at 4:30 p.m. (A. 14, 23).)[36]

This was, in any event, the first time that petitioner implicated himself in the Weiss affair. (A. 34; see also A. 70, 94.) He told DeSimone, Ventimiglia, Meola and Jarmolowicz (A. 14) that he struck Miss Weiss from behind, took her purse and a package from her, and fled to the bathroom in a nearby boarding house where he rifled the purse before discarding it. (A. 14-16.) Detective Ventimiglia testified that:

> "At this point, I asked him to describe the way he had assaulted this woman and he told us that he had struck her over the head with his hand. At that point I interjected, I said to him, 'Bill, if I were to tell you that this woman was bleeding from the head you could see that you couldn't possibly do that with your fist,' and he was hesitant and then admitted that he had used the pipe on her and that he had struck her one blow." (A. 15.)

Detective DeSimone recalls that *both* he and Ventimiglia told petitioner that petitioner could not have struck Miss

[36] Ventimiglia appears to fix the time of the entire episode later than does DeSimone. (See A. 14, 23.) The Ventimiglia account leaves considerable time unaccounted for between noon and the late afternoon.

Weiss with his fist. (A. 118.) DeSimone relates this version of the conversation:

> "I said to him, 'Willy, I don't believe you are telling me the truth.' I said, 'This woman couldn't have possibly incurred this injury, the type injury she had by someone striking her with a fist. Her head was fractured on the top,' and I spoke this language, I said, 'Willy, she would have had to go up and do a sailor's dive on the sidewalk in order to get that type of fracture,' and then he said to me, 'Well, isn't it more serious if you use a weapon rather than your fist?' I said, 'Willy, I am not concerned with whether it is serious or not, I only want the truth from you.' Then he says, 'All right, I used a lead pipe.'" (A. 118-119.)

Petitioner's story was discrepant from the known facts of the Weiss assault in at least one other serious and obvious regard. Although petitioner asserted that he had taken a package from Miss Weiss and had thrown it into a trash barrel (A. 15-16), the fact of the matter was that the Weiss assailant did not take any such package (see Appendix E, para. A(1), *infra*). DeSimone says that he did not call this discrepancy to petitioner's attention because he was not "exactly positive that [petitioner] . . . . hadn't taken the package at that time" and thought the package a "small detail." (A. 119.) Ventimiglia does not offer any explanation as to why petitioner was cross-questioned upon incriminating details but not upon potentially exculpatory ones.

Petitioner was next taken into the anteroom to identify the kind of pocketbook he claimed to have taken from Miss Weiss. (A. 16; see Appendix D, para. A(4), *infra*.) He

"agreed to accompany" the detectives to the area of the Weiss assault to show them where he had disposed of the contents of the pocketbook. (A. 17.) DeSimone, Ventimiglia, and Meola drove petitioner to the area, where they had him first reenact the attack at 31st Street and 13th Avenue, then take them to the boarding house at 31st Street and 15th Avenue, then take them to a spot on 26th Street where he said he had buried the Weiss pocketbook and its contents. (A. 17-18, 34-35, 120-121.) Here, Ventimiglia sat in the police car with petitioner while DeSimone and Meola dug at the indicated spot. (A. 34-35, 67-68.) After a while, petitioner called the detectives back, said "No, it is not there," and recanted his entire Weiss confession as a fabrication. (A. 18, 66-67.) He said "I didn't do it, I didn't do it at all." (A. 124.)

This trip to the East side of Paterson consumed between a half hour and "a little better than an hour." (A. 34, 64, 68, 85, 160.) Notwithstanding Judge Schamach's instructions (see p. 17; *supra;* pp. 47-48, *infra*), Probation Officer Jarmolowicz did not accompany petitioner and the detectives. (A. 85, 160.) At the conclusion of the trip, petitioner had recanted his Weiss confession; and he had so far said nothing indicating involvement in the Giambra matter (A. 64). He was returned to the Grand Jury Room at the Court House (A. 18, 24, 35) sometime between 5:30 and 6:30 p.m. (A. 24-25, 34-35).

Petitioner remained in the Grand Jury Room with the detectives, now rejoined by Jarmolowicz, for between fifteen minutes and an hour (A. 25-26, 35) while another neighborhood friend of his, Robert Stopford, was brought in and tested on the polygraph (A. 18, 35-36, 68). (A. 35-36, 160.) Then "we confronted . . . Monks with Stopford at approxi-

mately 6:30 p.m. and in Monks' presence Stopford repeated that Monks had told him about the Weiss assault.[37] There was no answer from Monks. He just lowered his head onto the table." (A. 18; see also A. 36, 79-80, 82, 94.) This confrontation took place in the Grand Jury Room, in the presence of DeSimone, Ventimiglia, Meola and Jarmolowicz. (A. 19.)[38]

Stopford remained in the Grand Jury Room "[j]ust a few minutes." (A. 36.) After he left, DeSimone "interrogated [petitioner] . . . for approximately a half hour." (A. 36.) Both Ventimiglia and Jarmolowicz were close enough to hear this interrogation. (A. 54, 77, 86.) It is best conveyed in DeSimone's own words:

> "Q. Mr. DeSimone, at any time in this questioning did you have a father and son talk with William Monks? A. I did, sir. Well, it was an interrogation—you might characterize it as such.
>
> "Q. What did you say to him? A. Well, in essence I told him, . . . one of the first things I said to him, I said, 'Willy, don't man me.' Every word out of his mouth was, 'Man, man, man, man.' And then I said, 'Look me in the eye, Will. Honest people look each other in the eye when they are telling the truth.' And, incidentally, it was in a low tone of voice and Mr. Jarmolowicz was sitting no more than two feet away from me, from us. We were all in a huddle. I said, 'Will, I believe you committed this crime. If you didn't do it, don't admit it, don't tell me you did, but if you

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[37] See Appendix C, para. A(2), *infra*.

[38] At a later point in his testimony, Detective Ventimiglia appears to forget that the Stopford confrontation occurred at this time. (A. 24-26.)

did, Will, tell me the truth,' and then I went into various things such as, 'Willy, if you did do it you can fool everybody but you can't fool God and you can't fool yourself,' and I carried on, I went into various aspects of the case, the facts of what Stopford had told us, of what Ogg had told us, his general demeanor throughout and the early investigation up here in the Shelter, and I truthfully told him that, 'You yourself admitted without me asking you a thing—'[39] . . . and then it carried on into other sort of fatherly talk, if he did do it, confess; if he didn't do it, 'I don't want you to confess it.'

"Q. What exactly was said during this so-called fatherly talk? A. Well, that general conversation. . . . There was one other little phase. I said, and I don't know exactly how I worded it, but it was in essence, 'If you did it, confess it, you will feel better for it and everyone in general—' I can't think of the exact words but I went over the entire interrogation—when I am sitting talking to someone heart to heart I can do a better job than I can do here.

"Q. How long did this heart to heart talk take? A. I should judge twenty minutes, a half hour or less.

"Q. And it was after this heart to heart talk that he told you this story? A. No. Then I told him, I said, 'Willy, no one is going to speak to you at all. Go over and sit in that corner and you search your

[39] The reference is to petitioner's statement during his interrogation on February 18, that it was snowing on the night of the Weiss assault. (See pp. 17-19, *supra*.) The omitted portion of DeSimone's testimony, indicated by the ellipsis in the text next following, is DeSimone's description of the February 18 interrogation.

conscience, Willy." I am going to go out for food. What do you want to eat?' and I took down his order, what he wanted to eat, and I said, 'Sit over there now and just search your conscience and think of what you want to do,' and then I left." (A. 41-43; see also A. 77-78, 86.)

But DeSimone's promise that no one would speak to the petitioner was not kept. While DeSimone and Meola went out for food (A. 78, 86-87), petitioner was brought back into the interview room and "put on the machine again" (A. 179) by Mr. Arthur (A. 179, 258-262, 264-265). This new, fully Miranda examination and interrogation began at about 7:30 p.m. (A. 258), and lasted for approximately a half hour (A. 262). It is the only one of Mr. Arthur's face-to-face sessions with the petitioner that the record describes in any detail.

How the session began is not stated. At some point, however, Mr. Arthur showed petitioner a key. Petitioner claimed that he had never seen it before, and Mr. Arthur informed petitioner that petitioner knew this was the kind of key that was on Miss Goldstein's person. (A. 262, 264-265.) Petitioner said nothing. (A. 265.) In his testimony Mr.

Detective Leonard DeSimone[*] appealing to the fact he wants his conscience and to relieve himself of the truth, that he would feel better and that he would certainly be a credit to himself. (A. 78.) Detective Meola also heard DeSimone tell petitioner to "search his conscience." (A. 86.)

[*] It is unclear whether, in this testimony, Detective Vantuyglio means that petitioner was in the interview with Mr. Arthur for a half hour prior to DeSimone's return (see text, infra), or whether the half hour including the period when DeSimone was absented with petitioner. The entire sequence of events, and the details of petitioner's interviews first with Arthur and then with DeSimone (text, infra), make the former construction more likely. (See A. 78-79.)

Arthur first says that he had not previously asked petitioner about this key (A. 58), but later admits that petitioner had been asked about the key and had denied knowing it was like Chambers's (A. 689). Now Mr. Arthur categorically stated, on the basis of the polygraph test, that petitioner did know the key was like Chambers's. (*Ibid.*) He did not give petitioner a chance to deny that assertion because "I had given that chance to him previously." (*Ibid.*)

> "... I said that he knew that this was the type of key that was in Miss Chambers's purse and he did not say anything, and then I talked to him anywhere from about one minute to maybe two minutes and I used the words, 'you did hit her, didn't you?' and he nodded his head affirmatively, and then I asked him some other questions and he didn't say anything, and I again used the question to the extent that I asked him if he did hit her and again he nodded his head affirmatively, and I asked him some other details, and at this time he spoke for the first time in probably five minutes and said he wanted to talk to Mr. DeSimone and tell him the story." (A. 58.)

Although Mr. Arthur had previously asked petitioner whether he was involved in the Chambers case, this was the first indication given to petitioner that he was. (A. 58.) It came at about 8:30 p.m. (A. 57.) Arthur immediately sent out to call for DeSimone (A. 59, 57), who was hastily summoned from the local store (A. 36-37, 43). DeSimone returned to find petitioner and Arthur still in the anteroom.

[illegible] (A. 60-61.)

(A. 89, 96, 97, 133.) Arthur said that petitioner wanted to talk to DeSimone alone, and then Arthur left. (A. 43, 97, 135, 136.)[*] DeSimone said "very well," and shut the door. (A. 136.)

> "I turned to him and I said, 'Yes, Willy?' and he said, 'I want to tell you the truth, I will tell you the whole story.' I said, 'All right, Willy, start right from the beginning.'" (*Ibid.*)

Petitioner then confessed that he had committed the attack on Miss Grandison. (A. 134-135, 136-138.) DeSimone and Ventimiglia testify that the confession was completed in ten or fifteen minutes. (A. 89, 97.)[**] However, it is plain that petitioner told the details of his story under prompting and questioning by Detective DeSimone. (A. 136-138.) DeSimone at some point "ran out" into the Grand Jury Room, returned with a sketch of the site of the Grandison assault, and thereafter had petitioner indicate on it the places to which he referred in his confession. (A. 135-137.)

DeSimone next took petitioner back to the Grand Jury Room, where, together with the three detectives, Arthur and Jaramillo (A. 89, 96), he was permitted to eat (A. 36, 37) a dinner consisting of coffee or milk, a sandwich and a piece of pie (A. 88, 110, 116). No one talked with petitioner during dinner; but, when the meal was finished, DeSimone interrogated him again for between fifteen

[*] Ventimiglia, however, appears to believe that Arthur was in the conference with DeSimone and petitioner. (See A. 97.)

[**] DeSimone fixes the hour at 5:30 p.m. (A. 134), but this appears to be a mistaken reference to petitioner's later repetition of the Grandison confession to the several detectives in the Grand Jury Room. (See text, *infra*.)

minutes and a half hour. (A. 37-38.) At 8:46 p.m.,* petitioner made a detailed confession of the Giambra attack (A. 20) in the presence of DeSimone, Ventimiglia, Meola, Arther and Jarmolowicz (A. 19, 154-155).

The detectives then sent for a stenographer (A. 38) and for the prosecuting attorney (A. 129-130). The prosecutor came into the Grand Jury Room and talked with petitioner (A. 129-130, 151.) The stenographer arrived sometime shortly before 10:30 p.m., at which time petitioner was moved into another room—variously described as a judge's chambers (A. 27-28) and a court reporter's office (A. 9)—for the transcription of formal confessional statements. (A. 27-28.)

Between 10:45 and 11:30 p.m. petitioner's formal confession to the Weiss attack was transcribed. (A. 7, 11, 86, 106.) It was taken down by a court reporter (A. 7) who was instructed by the detectives to transcribe nothing but the questions and answers (A. 11). Detective DeSimone asked the questions. (A. 20, 106-110.) The reporter did not record the conversation in shorthand, but typed the questions and answers directly on the typewriter. (A. 10.)

* There is some confusion as to this hour, although Ventimiglia states it categorically (A. 20). It is consistent with his statement that petitioner emerged from his private session with Arther and DeSimone in the anteroom at a little after 8:00 (A. 26-27). But DeSimone testifies that 8:46 was the time of petitioner's private conversation with Arther (note 11 *supra*), and that thereafter they ate dinner, not finishing until 9:30 p.m. (A. 38-39). The 9:30 hour is improbable, since after dinner (1) Monks repeated his confession during questioning of 15 minutes to a half hour (text, *supra*), (2) a stenographer was called for, who did not arrive for a half hour to an hour (A. 38), and (3) Monks was taken to another room for the transcription of his formal confession (A. 27). The formal confession began at 10:45 p.m. (A. 7, 86, 106.)

This confession was taken in the presence of Prosecuting Attorney Joelson, one Captain O'Brien (whose name is not mentioned earlier), Detectives DeSimone, Ventimiglia and Meola, and Mr. Jarmolowiez. (A. 7-8, 10-11.) After its conclusion, there was a half-hour break during which coffee might have been brought in or the reporter might have been preparing the statement for signature by the attendant witnesses. (A. 11-12.)[8] Throughout the half-hour, petitioner and all of the persons just mentioned remained in the room. (A. 11.) Then, between midnight and 1:00 a.m.,[9] petitioner's formal confession to the Giambra attack was taken in the same fashion and in the presence of the same officers and officials. (A. 8, 9-11, 86.) Both statements were formally witnessed by Joelson, O'Brien, DeSimone, Ventimiglia, Meola and Jarmolowiez. (A. 84; Exhibits 85, 86.)

However, Detective Edmond appears also to have been in the room toward the conclusion of the interrogation. He testifies that while petitioner was reading over and signing his statements, Edmond was also reading a copy. Edmond noticed a reference to a leather jacket worn on the night of the Giambra offense and asked petitioner where it

[8] The indecisiveness in the text is that of the reporter, testifying below, who said that he could not recall exactly what was going on during the half hour. Perhaps petitioner was given a glass of milk during this period. His confession in the Giambra matter, completed at 1:00 a.m., recites among the concluding questions and answers that petitioner had a glass of milk "[a]bout ten minutes ago." (A. 111.) On its face this seems to assert that petitioner was given milk during the taking of his one-hour statement, but it may mean that he had milk ten minutes before the statement began.

[9] The confession itself recites its completion at 1:00 a.m. But a notation "1:30 a.m." appears on a map used in taking the statements, and DeSimone testifies that he made the notation "after we had completed both statements." (A. 151.)

was. Petitioner directed Edmond to the first floor rear hallway of his home, where Edmond shortly thereafter recovered the jacket. (A. 155-156.)

> "And with that there was an autopsy picture lying face down. It was used previously in the questioning but it hadn't been seen by him. It was the autopsy picture which shows the two blows to the scalp.
>
> " . . . It was lying face down on the table. We had not showed that to him so he looked over at the picture and he said, 'Can I see how hard I hit her?'
>
> "And with that I gave him the picture and he studied the picture. . . ." (A. 156.)

Then, after 1:00 a.m. on February 27, DeSimone and Jarmolowicz returned petitioner to the Children's Shelter. (A. 114.)

At 9:00 or 9:30 the same morning (A. 114, 134, 156), petitioner was again brought from the Shelter to the Court House. (A. 20-21.) At the prosecutor's office, Detective Edmond showed him the black leather jacket which Edmond had obtained at petitioner's home during the night. Edmond asked if it was the jacket that petitioner had worn "that night," and petitioner said it was. (A. 156.) Then DeSimone, Ventimiglia, Mesdar Jarmolowicz and one Sergeant Garrity, a police photographer, drove petitioner back to the East Side of Paterson. (A. 21.) During a trip that lasted between a half hour and an hour (A. 134), petitioner reenacted first the Weiss and then the Gramhra assaults, while Garrity photographed him in various poses. (A. 21, 44-48, 120-122, 130-134; Exhibits S-7 to S-18.)

On February 28, Detective DeSimone again saw petitioner apparently at the Children's Shelter. The detective

showed petitioner a metal sample, but petitioner said that it was not like the weapon he had used. He described the weapon. (A. 115.) Later the same day, petitioner saw his mother (A. 116; Tr. 111, 72-73), for the first time since his arrest (see text, *infra*).

On March 1, DeSimone, Edmond and Jarmolowicz brought petitioner another metal sample. Petitioner described the differences between the sample and the weapon. He drew a sketch of the weapon which DeSimone had him sign and which was admitted into evidence below. (A. 115-116; Exhibit S-20.) On the same day, delinquency petitions were filed in the juvenile court, charging petitioner with the Weiss and Giambra offenses. (A. 3, 4.)

On March 2, DeSimone, Edmond and Jarmolowicz again questioned petitioner (A. 125-126), who now told a new and different story about his means of disposition of the weapon (see Appendix E, paras. A(3), B(3), *infra*).

On March 8, the juvenile court first appointed counsel for petitioner. He saw his lawyers that same day and immediately repudiated his confessions.[11]

b. The Nature of Petitioner's Detention and Interrogation

We come now to the quality of the experience that this 15 year old petitioner underwent during the days and hours preceding his confession.

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[11] Uncontradicted defense testimony at A. 117, 205.

i. *Incommunicado confinement; police presence*

We have seen that petitioner was in custody throughout the period from 1:00 a.m. on February 16, 1957, until he confessed on February 26 and 27. (Pp. 16-17, *supra*.) During this period, he saw no member of his family, no lawyer (except the Prosecuting Attorney), no friend (except during his "confrontations" with Ogg and Stopford), and no friendly or supportive figure (except the Probation Officer, Jarmolowicz, to whom we shall return, *infra*). (A. 78.)[49] Neither the interrogating detectives nor Jarmolowicz at any time asked petitioner if he would like to see his mother or his father. (A. 71, 96.) Neither the detectives nor the probation officer told him he could see a lawyer. (A. 71, 96.) The Superintendent of the Children's Shelter where he was confined never communicated with petitioner's parents or asked petitioner whether he might want to see his parents. (Tr. 111, 74.)[50]

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[49] The reference in the text is to the testimony of Detective Ventimiglia. It is corroborated by uncontradicted defense testimony that during the entire period of his confinement, petitioner saw no member of his family (A. 102), no attorney (*ibid.*), and no friends save Ogg and Stopford when he was "confronted" with them (*ibid.*). As we have seen, counsel were appointed for him ten days after his confessions, on March 8, 1957. (Note 48, *supra*.)

[50] Questioned about visiting regulations at the Shelter, the Superintendent did say that the practice was to send out a letter to the parents of a child who was in detention notifying them of the visiting days and hours. "That would be on Thursdays and Sundays from one to three, and there were, of course, exceptions made where the family could not get here on those particular days." (Tr. 111, 76.) But there is no testimony that this notice was sent out in every case or in petitioner's case; and petitioner's mother testified unqualifiedly that she did not receive any notice or know that he was in custody until she read of it in the newspapers. (Tr. 111, 183-185.)

Yet both the police and the juvenile probation authorities knew that petitioner's mother had been trying to find him. Her uncontradicted testimony establishes the following facts:

Petitioner had been missing from his home about six weeks prior to his arrest. On the day after he disappeared, January 8, 1957, she reported his absence to the police and also to the probation department. She was assured that he would be picked up and brought home. Subsequently, she made several additional calls to the probation office, and one call and one visit to the police. (Tr. III, 182-183.) Yet she was never notified of her son's apprehension during ten days following his arrest, and she learned that he was in custody only after the newspapers printed the story of his confessions. (Tr. III, 183-185.) Detective Ventimiglia confirms that the police made no efforts to contact petitioner's parents. (A. 74.)

On the other hand, petitioner saw no lack of policemen during the interrogative process. He was repeatedly questioned in the presence of Detectives DeSimone, Ventimiglia and Meola, as well as Probation Officer Jarmolowicz—except when he was put "on the machine" by the polygraph expert, Mr. Arther. At the time of his formal confessions, he was additionally attended by the Prosecuting Attorney and Captain O'Brien, and, toward the finish, by Detective Edmond. The following day, DeSimone, Ventimiglia, Meola, Jarmolowicz and a police photographer escorted him on a round of reenactments. (See A. 7-8, 9-11, 12, 14, 19, 21, 52, 92-93, 155-157.)

Doubtless, with the exception of a few stray questions, all of the interrogation was done by three men: DeSimone,

Ventimiglia and Arther. (See A. 92-93.) But the sheer weight of police presence surrounding the boy, particularly during the all-day, all-night episode of February 26, was imposing. Throughout that entire day, from 10:00 a.m. until 1:00 a.m. the next morning, he was never out of the presence of several police officers, except in the privacy of the polygraph room. (A. 23, 30-39, 53-54, 64, 68-69, 80, 89, 91.) Throughout that day, no one spoke a word to him except his interrogators. (A. 68-69.)

Asked if petitioner were ever left alone on February 26, Probation Officer Jarmolowicz testifies:

> "Yes. That was later in the afternoon. I believe after he had made an admission he was left alone.
>
> " . . . Somewhere late in the afternoon he was given a rest. I would say it lasted for about 40 minutes." (A. 89.)

This forty-minute period—spent in the corner of the Grand Jury Room in which several detectives and Jarmolowicz were also present (A. 91)—was the only sustained period during the day when petitioner was not the focus of interrogation. (*Ibid.*; see A. 89-94.)

ii. *Persistence and pressure of the interrogation*

The general strategy and character of the interrogation on February 26 were described by Detective Ventimiglia:

> " . . . [W]e were working with Mr. Arther. He would put the boy on the machine and certain things were done such as the bag [the Weiss pocketbook] and certain reactions . . . [A]nd then we would be guided by whatever his findings were on the machine." (A. 73.)

For example (in Detective DeSimone's words):

> "I might have said Willie, how do you account for the fact that you were shown five pocketbooks and you got a reaction only on one pocketbook . . . [W]hen he got to the Weiss pocketbook it showed a reaction." (A. 147.)

This procedure explains petitioner's trips in and out of the Grand Jury anteroom. In all, he was put "on the machine" a total of nine times on February 26 (A. 58-59, 61-62), for testing on different aspects of the Weiss and Giambra cases (A. 62). Mr. Arther testifies that the duration of each polygraph test proper was between one minute and two-and-a-half minutes (*ibid.*); but, of course, Arther himself alternated testing periods with bouts of interrogation. (See A. 55-57, 59-61.)[51]

With regard to the polygraph, Arther told petitioner "probably on two occasions" that "if he was telling the truth this would indicate that to me and if he was not telling the truth, it would indicate that to me also." (A. 59.) DeSimone built upon this point, telling petitioner "no more than two or three times" that the machine showed he was not telling the truth. (A. 146-147.) All of the interrogators agree that petitioner began by denying involvement in either the Weiss or the Giambra matters and persisted for a time in the denial. (A. 60, 71-72, 93-94.) But he was repeatedly accused of involvement (A. 72) either on the basis of the polygraph (A. 56-57, 60-61, 147) or on the basis of his admissions, February 18, that he knew it was

[51] Petitioner's testimony is consistent with Arther's but more explicit. He explains that Arther would run a test, then question him for 10 or 15 minutes, then run another test. (A. 201.) Petitioner says that the questioning tired him rather than the tests themselves. (*Ibid.*)

showing on the date of the Weiss assault (A. 28, 42, 73) or on the basis of his supposed admissions to Ogg and Stopford (A. 42, 73).[52, 53] Jarmokowicz described this portion of the interrogation as follows:

> "Q. And prior to 4:00 or 4:30 the boy had been interrogated on and off for either six or six and a half hours, had he not? A. With intervals of eating and testing, yes. [Note: There was one meal prior to 4:30; "testing" refers to the polygraph.]
>
> "Q. And during that period of six or six and a half hours, were there not occasions when he denied that he had done these things? A. Yes.
>
> "Q. Weren't questions put to him— A. Yes.
>
> "Q. (Continuing.) —and he denied complicity? A. If I recall, yes, he was denying it.
>
> "Q. And there were many denials, were there not? A. Well, I would say no more than four or five, three to five, because the questions were not constantly asking for admission. They were leading questions up to a certain point and then a question would be asked him and he would deny it." (A. 93.)

Later, after petitioner made his 4:30 p.m. confession to the Weiss affair and then recanted it within the hour, his

[52] "And I also said to him that he had just been taken into custody for grabbing bags and that we were satisfied that there was some indication by his own statement that he knew something about this Weiss matter and that our investigation in talking to Stopford and Ogg indicated that he was responsible for the Weiss attack." (A. 73.)

[53] The detectives also led petitioner to believe, incorrectly, that they had the pocketbook that was taken from Miss Weiss. (See A. 16, 18.) What they had was another pocketbook identical to it. (A. 16; Tr. I, 50, 52.)

interrogation was continued. "[H]e admitted it and he denied it, then he re-admitted it." (*Ibid.*) Still later, after he had finally confessed to the Giambra matter, the interrogation was continued. (A. 37-38.) As in all such cases, it is difficult to know exactly how much questioning petitioner underwent. But by the time of his formal statements late that night, DeSimone was able to say of the details of the offenses that: "[w]e had gone over that time and time again." (A. 152.)

DeSimone's characterization of the interrogation is that it was "on and off." (A. 148.) The atmosphere of this "on and off" sort of questioning appears more fully in a description by Jarmolowicz:

> "Q. And would it be correct to say that he was constantly interrogated regarding these matters? A. No.
>
> "Q. Well, were there any times when there was no discussion about these cases? A. No. What would happen is the officers would go off at a distance and give themselves a series of questions to ask him and before they came back maybe 5, 10, 15 minutes would pass, perhaps more.
>
> "Q. But the boy would be aware, would he not, of the fact that they were just preparing for the questions? A. Well, I assume so. He had nowhere to go.
>
> "Q. Could you properly say, therefore, that this was a continuing process of interrogation from approximately 10:00 o'clock in the morning until the statements were made? A. Well, I wouldn't say it was a continuing direct questioning. I would say it would be an episode of questioning with intervals of rest for the boy because the officers concerned wanted to compare

notes with themselves and probably cover points that the other wasn't thinking of.

"Q. Well, referring to these intervals when the officers would compare notes, how many of them were there? A. Well, I think almost always Officer Ventimiglia and Vincent DeSimone were there.

"Q. When they conferred or in preparation for these little conferences did they indicate to the boy that they were going to leave him alone? A. No. They would just simply cease questioning him and the boy sat in the chair and I believe the officer sat at a table facing him there. It was a long table about this size (indicating).

"Q. And the boy would be told either expressly or impliedly to remain where he was, is that right? A. He was never told. He just remained there.

"Q. But would the officers withdraw from the room? A. Only to go to the bathroom.

"Q. Or did they go over to the corner of the room to confer? A. Yes.

"Q. Whispered conversations? A. Yes.

"Q. These took place in the presence of the boy? A. Yes. I took advantage of one of those episodes to ask the boy that if he really knew anything about these offenses that he should unburden himself and search his conscience and that he would feel much better if he told it because he would have it to live with the rest of his life, the sort of counseling I would give any boy in any juvenile court.

"Q. These episodes wherein these conferences between the police officers took place lasted for approximately five minutes or ten minutes, is that correct? A. I think the longest was about ten to fifteen minutes.

"Q. You wouldn't— A. And even there there were interruptions where we just sat there.

"Q. Was it your understanding that while these things were going on that they were just preliminary to further interrogation? A. Oh, yes. I knew what the purpose of these interrogations were.

"Q. So you wouldn't properly characterize these intervals as rest periods, then, would you? A. Well, he was resting insofar as the fact that he wasn't answering questions, which was to a degree a rest for him.

"Q. Well, they were really interruptions in the interrogation, weren't they? A. That's it.

"Q. Very brief interruptions? A. Yes." (A. 89-91.)

One striking instance brings home with particular clarity the impression that was made on petitioner's mind by these sorts of "whispered" conferences during his "rest" periods. That is the matter of the autopsy photograph of Giovanna Giambra's head, which Detective Edmond testifies "was used . . . in the questioning, but . . . hadn't been seen by [petitioner]." (A. 156.) Asked how the photograph was used in the questioning, Detective Edmond replied:

"Well, they were asking about the number of blows struck and they referred to it.

". . . [T]hey asked him how many blows he struck and, of course, they would check the picture when he said two blows." (A. 157.)

For the purposes of this Statement, we may accept the proposition that, "of course," three experienced detectives, who have been on a homicide case for three months, have to look at an autopsy photograph in the presence of a

fifteen year-old suspect whom they are questioning in order to refresh their recollection that two blows were struck. Nevertheless, this use of the photograph communicated its message to petitioner. We are told that after he confessed he "looked over at the picture and he said, 'Can I see how hard I hit her?'" (A. 156.)

iii. *Petitioner's physical and mental state*

Petitioner had no sleep at all between the early morning hours of February 26 and 1:00 a.m. Februrary 27 following his confessions. (See A. 91-92.) He was fed three meals during the day: breakfast at the Children's Shelter at 7:00 a.m.;[54] lunch shortly after noon, dinner sometime between 7:30 and 8:45 p.m. (see *Chronology, supra.*)[55] Lunch and dinner were each coffee or milk, a sandwich and pie. (A. 88-89, 110, 114.) Apparently between his two formal confessions or during the second of them he had a glass of milk. (See note 46, *supra.*)

Jarmolowicz describes petitioner as relaxed and alert during the interrogation of February 26-27 (A. 91-92) and as appearing "relieved" after he made his confessions (A. 98-99). Throughout most of the day, there was "a tension of some sort, but not unduly so" (A. 99), and even this tension appeared relieved when petitioner confessed (*ibid.*). Petitioner read his transcribed confessions carefully, and made five or six corrections on them. (A. 165-167.)

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[54] Uncontradicted defense testimony, at A. 102-103.

[55] Jarmolowicz appears to testify that petitioner ate at noon, 7:00 p.m., and again at 9:00 p.m. (A. 88.) This seems another example of the probation officer's testimonial inaccuracy. (See notes 30, 33, *supra;* text, *infra.*) Petitioner's confessions themselves recite that he had three meals during the day, including breakfast (A. 110, 114), and this is consistent with the *Chronology, supra.*

DeSimone's description indicates somewhat greater volatility and swings of mood on petitioner's part:

> "... [T]hroughout the day he was bright, alert, at times very belligerent and surly, cursed many times. In intervals he would make outbursts when we would confront him with certain things and every other word was 'Man, man, man,' until the point when I had the talk that has been referred to so often as a fatherly talk. Thereafter he was calm and relaxed. As a matter of fact, after I had taken the second story, the second oral story, I summoned Mr. Joelson, and Mr. Joelson came in and Mr. Joelson sat there and had a talk with him, he was bright eyed and wide awake, and I believe Mr. Jarmolowicz will bear out that he seemed to lose that tenseness in the middle of my chat with him and for the first time didn't act like a tiger. As a matter of fact, he even threatened bodily injury to Mr. Arther at times.
>
> "...
>
> "... [T]hen he would relax and be semi-cooperative and then he would get belligerent again and surly, but in his conversation every other word was 'man, man, man'." (A. 129-130.)

iv. *Lack of warning to petitioner of his rights to counsel and to remain silent*

The police testimony is plain that petitioner was never warned of his rights to counsel or to remain silent until just before the taking of his formal confessional statements late at night on February 26. Ventimiglia and Jarmolowicz testify explicitly that the first constitutional cautions they heard given to petitioner came at the outset

of his transcribed confessions at 10:30 p.m. and midnight on the 26th. (A. 22-28, 71, 95-97.)[56] DeSimone's testimony is somewhat more vague, and is probably inconsistent with that of Ventimiglia and Jarmolowicz.

DeSimone admits that the first time he warned petitioner of his rights was between 9:30 and 10:30 p.m., after petitioner had finished dinner, undergone a half-hour of post-dinner interrogation and "related certain facts." (A. 37-39.) By these "facts", it is plain, DeSimone means to refer to petitioner's second oral confession of the Giambra attack. (See A. 19-20, 154-155.) Thereafter (A. 38), DeSimone said:

> "William, we are going to ask you to give us a voluntary statement. You may do so or not, just as you wish. Everything you say must be of your own free will without any promise of reward or threats having been made to you, and, as you know, it will be taken down in writing and anything you say may be used against you in a trial. Do you agree to give such a statement?" (A. 38.)[57]

When petitioner said "Yes, sir, Mr. DeSimone" (*ibid.*), "then arrangements were made to bring in a stenographer" (*ibid.*). DeSimone's disagreement with Ventimiglia and Jarmolowicz relates only to whether any sort of warning was given to petitioner before the stenographer arrived.

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[56] Ventimiglia or Jarmolowicz was present during all of petitioner's interrogation except the polygraph sessions with Mr. Arther and the private interview with DeSimone at about 8:00 p.m. (A. 23, 53-54, 64, 68-69, 85-94.) Concerning Jarmolowicz's careless statement, at one point in his testimony, that petitioner said he understood his rights, see text, *infra*.

[57] Petitioner replied that he did agree. (A. 38.)

All of the officers concur that the first warning came, at the earliest, following petitioner's afternoon confession of the Weiss matter and following his oral confessions of the Giambra matter both to DeSimone alone, and then to the detectives, Arther and Jarmolowicz.

At the outset of the transcribed confessions, DeSimone asks the questions: "Do you agree to give a statement?" and "Is this statement to be given by you voluntarily without any threats or promise of reward knowing that it will be used against you in a trial?" (A. 106.) (See also A. 22-23, 95, 110.) The questions are answered in the affirmative by petitioner. (*Ibid.*) No other constitutional warnings were given to petitioner throughout the interrogation prior to his confessions of February 26-27.[58] Prior to the reenactments of February 27, petitioner was given no further warnings of any sort. (A. 22.)[59]

v. *The protection given petitioner by Probation Officer Jarmolowicz*

We come now to the role played during petitioner's interrogation by Probation Officer Jarmolowicz, whose protective guardianship was relied upon by both courts below

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[58] The concluding questions of each formal confession also elicit petitioner's statements that he has not been threatened or abused or offered any reward for his confession. (A. 110, 114.)

[59] There is no evidence in this record that petitioner was aware of his rights without being told. The officers knew that he was a fifteen year-old boy. (A. 58, 71.) Prior to his present apprehension, he had been a juvenile court probationer (A. 199, 203-204), but no indication appears in the transcript of the nature or frequency of his involvement with the law. A psychiatric report that is included in the record does state that, as of November 1956, petitioner had been involved in nothing more than one instance of theft of a jacket and flashlight from an automobile, one instance of window-breaking, and some misconduct at school.

in sustaining the voluntariness of petitioner's confessions. (See pp. 53-55, *infra.*) Chester Jarmolowicz was a principal probation officer of the juvenile court in February, 1957. (A. 98.) He had fifteen years experience in the probation department, and had worked for ten years chiefly with juveniles. (*Ibid.*)[60]

On February 18, 1957, when Detective DeSimone secured the permission of Juvenile Court Judge Schamach to interrogate petitioner, the judge instructed Jarmolowicz "to be there with him to look out to see to it that he was not browbeaten or abused in any way or pushed to any extreme." (A. 98.)

> "I was instructed by Judge Schamach to be with the boy at all times when the boy was being questioned by the detectives. . . . I was instructed to be there because I was to see to it that the boy was not abused in any way or taken advantage of or exhausted or placed in a position where he might say something that his physical condition probably would not allow him to say otherwise." (A. 158.)

Several points require emphasis here.

First, as we shall see, Mr. Jarmolowicz recurred again and again in his testimony to the very limited character of his protective role as he understood it. He was there only to see that petitioner was not "browbeaten" or "abused" or "physically exhausted." (A. 87, 158, 163.) His testimony shows no sensitivity whatever to the subtlety of the forces that can make a fifteen year old child's confes-

[60] He had a college degree in pharmacy and had taken some non-credit sociology courses. (A. 98.)

sion involuntary. Indeed, it shows no sense of purpose to prevent the extraction of an involuntary confession, in a federal constitutional sense, so long as the petitioner was not physically ill-treated.

Second, Jarmolowicz fell considerably short of his assignment in even its most mechanical aspect. He was not in fact "with the boy at all times when the boy was being questioned by the detectives."[61] To the contrary, the record is plain that (1) Jarmolowicz was not present during any of the polygraph tests and incidental interrogation of petitioner by Mr. Arther either on February 21 or on February 26 (A. 27, 33, 52, 87, 159-161); (2) Jarmolowicz was not present during the critical tête-à-tête between petitioner and Detective DeSimone, in the Grand Jury anteroom, that occasioned petitioner's first confession of the Giambra offense (A. 19, 26-27, 161); and (3) Jarmolowicz was not present during petitioner's conveyance to the East Side of Paterson by three detectives on February 26 (A. 85, 160), for the purpose of reenactment of the Weiss assault.

Third, and more important, there is not a suggestion in the record that Jarmolowicz ever did a single thing, or spoke one single word, throughout those extended proceedings that he *did* attend, either to limit the power of the detectives to interrogate petitioner entirely as they pleased, or to support petitioner's will against erosion under such

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[61] The record does contain a few general professions by the interrogating officers that "Mr. Jarmolowicz was with us throughout the entire investigation." (A. 30; see also A. 13-14 and Jarmolowicz's own testimony at A. 85.) But all of these generalizations are immediately qualified by admissions that Jarmolowicz was not present during any of the interrogative episodes next mentioned in text.

interrogation.[62] There is no suggestion, either, that the detectives viewed Jarmolowicz as an actual or potential restraining influence. Therefore, Jarmolowicz could only have been of any assistance to petitioner on the assumption that his presence conveyed some sense of security or protection to petitioner's mind. But that assumption finds no support in this record. For, though Judge Schamach may have told Jarmolowicz that his role was to protect petitioner, neither the judge nor Jarmolowicz is shown to have informed petitioner of this protective role. For aught petitioner knew, Jarmolowicz was just another of his interrogators.[63]

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[62] We think we may fairly put aside the circumstance that Jarmolowicz once said to petitioner: "William, if you didn't do this, don't admit it." (A. 201.) (It is interesting that this episode was elicited from the petitioner through a leading question by the court, although no evidence of record had previously referred to any such conversation between petitioner and Jarmolowicz. (*Ibid.*) Jarmolowicz was present throughout the trial, apparently in his capacity as a probation officer, to assist the court. (See A. 6, 7.)

[63] Petitioner did know that Jarmolowicz was a probation officer, and he was told that Judge Schamach had assigned Jarmolowicz to stay with him. (A. 200.) But there is no evidence he was told that the probation officer was supposed to be supportive or protective, or different in any way from the other officers of the law who were trying to convince him to confess.

It is true that the court below elicited from petitioner a "yes" answer to the question: "And you know these probation officers try to help the probationers, do you not?" (A. 200.) With the utmost respect, we suggest that an answer of this sort to a question of this sort, asked by a juvenile court judge of a juvenile over whom the judge has complete dispositive power, is entirely lacking in probative value. The judge simply asked for the juvenile court mystique, and got it. But even if the answer is taken at par value, the substance of the awareness it asserts is too banal and vapid to do service for an understanding, clearly brought home to the petitioner, that Jarmolowicz had any effective role to play in shielding him from overreaching by the detectives. Whatever "help" a juvenile is likely to anticipate that he will receive from a juvenile court probation officer, it surely does not include assistance in refusing to answer questions that policemen make clear they want answered.

Fourth, one of the obvious evils of *incommunicado* detention and interrogation is that they deprive an accused of any impartial witness or observer of the substance and circumstances of an alleged confession. Jarmolowicz singularly failed to play the role of impartial observer. There were parts of the interrogation which he did not hear (A. 86-87, 158-159), "because I was instructed very carefully by the court, by the Judge, to be there only to see that the boy was not browbeaten or exhausted in any way which would be unfair to him" (A. 87). And again: "I wasn't really listening to the exact testimony because I was just there to see that he was not browbeaten or shouted at." (A. 163.) For example, Jarmolowicz could be of no help on the vital question whether petitioner had volunteered the contents of the Weiss pocketbook, or whether these were—as petitioner claimed—first described to him by the police. (A. 87.)

What is even more striking is Jarmolowicz's persistent ignorance of or indifference to the truth regarding the circumstances of petitioner's interrogation that are relevant to the issue of voluntariness of his confession. For example, he initially testifies that he first saw petitioner at about 10:00 a.m. on February 26 (A. 85), then admits that he picked him up that morning between 9:00 and 9:30 a.m. (A. 88, 160). He says that petitioner's confessions were taken "about somewhere after 10:00 p.m." (A. 85-86.) In fact, of course, one was taken between 10:45 p.m. and 11:30 p.m.; the other between midnight and 1:00 a.m. (See *Chronology, supra.* He testifies that the polygraph test administered on February 21 ran 30 or 40 minutes. (A. 159.) A detective's notes reflect that it ran three times that long. (A. 52.) Jarmolowicz testifies that the first

polygraph session with Mr. Arther on February 26 ran: "I don't think it was more than twenty minutes, perhaps thirty minutes that I recall." (A. 160.) Police testimony puts the length of the session at one and a half or two and a half hours. (A. 30-31.)

Jarmolowicz first testifies that he was with the petitioner at all times after 10:00 a.m. on February 26 except during the East Side excursion (A. 85), and then admits that he was also not with petitioner during the polygraph tests (A. 87, 160). If this is heedlessness, it is heedlessness of a high order; for the same error is repeated at a later point in his testimony, in a fashion that surprises even the prosecutor:

> "Q. [the Prosecuting Attorney]. And the rest of the 26th, was he ever questioned outside of your presence? A. No.
>
> "Q. Well, I call your attention to the subsequent lie detector tests. Were you present at the lie detector tests? A. I wasn't in the room but I was waiting outside that room.
>
> "Q. And when the boy spoke to Detective DeSimone alone on the 26th, where were you? A. I was in the other room." (A. 161.)

Questioned as to whether petitioner was warned of his constitutional rights, Jarmolowicz at one point volunteers the loose phrase that petitioner "said . . . he understood his rights." (A. 95.) Cross-examination concerning the phrase makes unmistakably clear that it is a complete fiction of Jarmolowicz's creation, having nothing to do with what petitioner in fact said. (A. 96-97.) For another example of Jarmolowicz's testimonial inaccuracy, see note 55, *supra*.

The point emerges unmistakable from this record. In the interrogation room, Jarmolowicz, together with the prosecutor and four policemen, formally witnessed petitioner's confessions. (A. 84, 94-95; Exhibits S-5, S-6.) At trial on the issue whether those confessions were coerced, Jarmolowicz was a witness inveterately hostile to petitioner. (See, for example, A. 99.) In view of his role, he could hardly have been otherwise. For, however he might have conceived that role initially, by the time of trial he must have realized that a finding of coercion would amount to an adjudication of his own dereliction.

vi. *Testimonial character of the confessions*

By the time petitioner was brought to the Court House for "testing" and interrogation at 10:00 a.m. on February 26, he was already a suspect. (A. 28.)[44] By the time his formal confessions began to be transcribed at 10:45 p.m. that night, if not much earlier, the detectives were positive that he was guilty. The formal confessions had only one purpose: to provide judicially cognizable evidence of his guilt.

Every circumstance surrounding the formal confessions points to this conclusion: —the method of transcription, the involvement of the prosecutor, the number of attending witnesses. Prior to the beginning of the question-and-answer sessions, also, DeSimone had prepared sketches of the sites of the Weiss and Giambra assaults, with directions. These were given petitioner to consult (in De-

[44] The referenced page refers only to the Weiss matter. However, what was true for Weiss was obviously equally true for Giambra. The investigating detectives had conceived the two offenses as a package from the outset of their interrogation of petitioner. (A. 98, 100, 127-128.)

Simone's words) "as he testified" (A. 151; see also A. 163), so as to make his story self-contained and understandable. (A. 149-154, 161-162.) While he was making his formal statements, he was not asked to point out matters on the sketches. ". . . [I]t was all clear to us. We had gone over that time and time again." (A. 152.)

> "He had explained minutely to me. The only thing I was trying to clear up was for the directions so he could clearly describe it on paper. I understood it. He had pointed it out to me, but for someone reading that statement I wanted to make that clear exactly what he was telling me. . . ." (*Ibid.*)

c. Findings of the Courts Below Regarding Petitioner's Confessions

The juvenile court made virtually no specific findings of fact relative to the circumstances under which petitioner's confessions were obtained. It concluded generally that the confessions were not "put . . . into William's mouth" by the detectives (A. 214), and that they were "voluntary" (A. 213) and "taken under circumstances that were fair" (A. 217). The major underpinnings of these conclusions were (1) that petitioner read his confessions carefully and made a number of corrections on them before signing them (A. 214); (2) that, following his confessions to police, he also made admissions to his mother and to an inmate of the Children's Shelter (see Appendix C, paras. (B)(1), (2) *infra*) (*ibid.*); and (3) that "[t]he Court assigned Mr. Jarmolowicz to sit with William and observe him and protest his rights. . . . The Court reposed this confidence in Mr. Jarmolowicz, and I have confidence in him as well, so

that I know there was no imposition upon William Monks during this questioning" (A. 213).

> "The circumstances that he was [in the Courthouse] . . . for a rather long period . . . on the 26th of February is perhaps unfortunate, but it was explained due to the various interruptions and waiting for the stenographer." (A. 213.)

> "I don't say that I completely approve of the incident, all of the incidents with respect to the lie detector test, but I don't think in this case that any harm was done to the rights of the defendant. . . . " (A. 217.)

The Superior Court opinion recites in general outline the uncontested chronology of petitioner's arrest, interrogation, confessions and reenactments. (A. 225.) It finds that petitioner was "advised by the officers to tell the truth and unburden his conscience" (*ibid.*), and that "at no time was [petitioner] . . . informed that he could see an attorney or his parents" (*ibid.*). "While his parents or an attorney were not present, their presence was not sought. . . ." (A. 227.) "During the hour-long wait for the reporter to arrive [i.e., between 9:30 and 10:30 p.m. on February 26], the police told [petitioner] . . . that he was being asked to give a voluntary statement and that it could be used against him," and he "agreed to give the statements." (A. 225.)

The Superior Court finds that Probation Officer Jarmolowicz was assigned to "protect [petitioner] . . . against any impropriety by the police" and that he "was present throughout the police interrogation and when [petitioner] . . . gave his written signed statements . . . ," except that he was absent during the trip to the East Side of Paterson on the afternoon of February 26 and when peti-

tioner "was alone with the polygraph operator." (A. 225-226.)[65] Like the juvenile court, the Superior Court relies heavily on the fact of Jarmolowicz's presence in sustaining the voluntariness of petitioner's statements. (A. 226-227.) It also relies upon his testimony that petitioner "was not mistreated, was alert and relaxed throughout the day, and the questioning was carried on in brief sessions with frequent breaks." (A. 226.)[66] Finally,[67]

> ". . . The questioning was not prolonged at any one time and there were frequent breaks. The initial interrogations [on February 18] were not only brief but pertained primarily to the unrelated purse snatchings for which defendant had originally been taken into custody.
>
> "The statements were taken late in the evening [on February 26] but this was due to defendant's withholding his willingness to give them until after dinner and the delay in getting the stenographer, who did not arrive until 10:30 P.M. . . . " (*Ibid.*)

(The court's characterization of this latter delay as "hour-long" (A. 225) inferentially finds that the stenographer was not summoned until 9:30 p.m.)

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[65] This finding is plainly erroneous insofar as it suggests that Jarmolowicz was present during the private conversation between Detective DeSimone and petitioner in which petitioner first confessed to the Giambra assault. All of the detectives and Jarmolowicz agree in testifying that Jarmolowicz was not present at this conversation.

[66] This last phrase appears to be the Superior Court's characterization of Jarmolowicz's testimony set forth at pp. 40-42, *supra.*

[67] The Superior Court also makes the non-controversial factual finding that petitioner was not physically abused. Concerning its conclusion that he was not "subjected to long and gruelling interrogations by relays of police officers" (A. 227), see pp. 64-65, *infra.*

Summary of Argument

I.

On the whole record, petitioner's confessions must be held involuntary. Plainly, they were extracted under pressures calculated to overbear the will of a fifteen year-old child. Petitioner steadfastly resisted those pressures until they broke him. *Haley* v. *Ohio*—by comparison, a mild case of coercion—requires reversal.

II.

Petitioner's present sentence of imprisonment for the maximum term of his natural life depends upon the factual finding that he committed the specific offense of first degree murder. His guilt of this offense was neither litigated nor adjudicated at his trial. It was *determined* at a post-trial proceeding of which he had no notice, and in his absence. Due process does not countenance any such procedure.

ARGUMENT

I.

Petitioner's Confessions Were Involuntary.

We have set out the undisputed facts surrounding petitioner's confessions in detail so that this Court may make its traditional "independent examination" of the question of voluntariness. *Ashcraft* v. *Tennessee,* 322 U.S. 143, 147-148 (1944); *Clewis* v. *Texas,* 386 U.S. 707, 708 (1967). The constitutional standard to be used in that examination is also traditional.[68] "The question in each case is whether a defendant's will was overborne at the time he confessed." *Reck* v. *Pate,* 367 U.S. 433, 440 (1961); see *Lynumn* v. *Illinois,* 372 U.S. 528, 534 (1963). As Mr. Justice Frankfurter put it:

> "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." (*Culombe* v. *Connecticut,* 367 U. S. 568, 602 (1961)).

Were this petitioner's confessions "the product of an essentially free and unconstrained choice"? That question needs be answered, strictly, only with regard to the formal, signed confessions taken between 10:45 p.m. on February 26 and 1:00 a.m. February 27, and the reenactments of the

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[68] By force of *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), no issue is presented here under *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), or *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

following day. For, if these were involuntary, petitioner's adjudications of delinquency cannot stand notwithstanding the earlier confessional evidence. *Payne* v. *Arkansas*, 356 U.S. 560, 567-568 (1958); *Culombe* v. *Connecticut*, 367 U.S. 568, 621 (1961); *Lynumn* v. *Illinois*, 372 U.S. 528, 537-538 (1963); *Gallegos* v. *Colorado*, 370 U.S. 49, 55 (1962). However, we think that the Court may also properly decide the question of the voluntariness of the oral confessions in the Giambra matter made between 8:00 p.m. and 9:30 p.m. on February 26. Petitioner has now been incarcerated for almost thirteen years on the basis of the Giambra charge. If the State of New Jersey has, as we submit, no constitutionally admissible evidence to connect him with that charge, we hope that the Court will say so now, and decisively.[69]

On the whole record, all of petitioner's confessions following 8:00 p.m. were plainly involuntary—the extractions of police-applied pressure that overbore petitioner's will. No other conclusion is possible consistent with *Haley* v.

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[69] This Court has frequently ruled upon the admissibility of more than one contested confession, the products of a single, ongoing interrogative process, even though reversal of a state conviction might have been predicated upon finding only one of the confessions involuntary. *E.g.*, *Reck* v. *Pate*, 367 U.S. 433 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Clewis* v. *Texas*, 386 U.S. 707 (1967). Here, as in those cases, petitioner may be subject to reprosecution in the Giambra matter. See *Johnson* v. *State*, 18 N.J. 422, 114 A.2d 1 (1955); *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959). Since the New Jersey statute discussed in Part II of this brief makes his reprosecution in the Weiss matter impossible, we see no occasion for the Court to consider the voluntariness of the oral Weiss admissions. Petitioner has already been imprisoned far longer than the maximum allowed by New Jersey law for the Weiss offense. We consider the formal Weiss confession herein because it is not realistically isolable, in the course of petitioner's interrogation, from the oral Giambra confession immediately preceding it and the formal Giambra confession immediately following it.

Ohio, 332 U.S. 596 (1948); and our legal argumentation might well stop with the citation of that case. However, because the Court "'cannot escape the responsibility of making [its] . . . own examination of the record'" herein, *Brooks* v. *Florida,* 389 U.S. 413, 415 (1967), we proceed to note the several factors that make petitioner's an extreme case of coerced confession.

First, petitioner was a fifteen year-old child at the time of his detention and interrogation.

> "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces." (*Haley* v. *Ohio,* 332 U.S. 596, 599 (1948).)

See also *Gallegos* v. *Colorado,* 370 U.S. 49, 54 (1962); *In re Gault,* 387 U.S. 1, 45 (1967).

Second, petitioner was detained without access to family, friends or counsel, for more than ten days prior to the interrogation of February 26. He was taken into custody by officers who woke him from his sleep at 1:00 a.m. and interrogated him "on and off" through noon of the following day. Then, without judicial hearing, he was placed in detention subject to the pleasure of his interrogators. It is true that he was questioned on only three days: February 18 (the Monday following his Saturday arrest), February 21, and February 26. But the officers made quite clear that this was because of the limited availability of the polygraph operator following the initial interrogation on the

18th. The message to the imprisoned boy was obvious: he would be held and questioned at police convenience until he confessed.

This point is an important one, to which the Court's coerced-confession decisions have attached considerable weight. *E.g., Chambers* v. *Florida,* 309 U.S. 227, 240 (1940); *Haynes* v. *Washington,* 373 U.S. 503, 514 (1963). When an accused is being detained and interrogated without judicial commitment, without a fixed date for court appearance or release, with no point in time that he can be assured will mark the end of the interrogation, and with no way to end it himself except to give the answers that are demanded by the police, even intermittent questioning imports an ominous threat. The police may be willing to take their time; but detention of this sort implies that they have both the purpose and the power to prolong the interrogation until the suspect breaks down and confesses.

> "In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks." (*Culombe* v. *Connecticut,* 367 U.S. 568, 575-576 (1961).)

This fifteen year-old petitioner, who had already been subjected to one session of all-night questioning immediately following his arrest, had no way of knowing when

the questioning would resume or how long it would continue. So far as he could tell—and so far as anyone can tell from this record—the police could take him from the Children's Shelter for interrogation whenever they pleased. Police power over him was apparently unlimited; and there was no one to tell him of its legal limits, or to help him enforce them, or to help him resist the demands of the police for self-incriminating statements.

Throughout ten days of detention and three sessions of interrogation, neither the detectives nor Probation Officer Jarmolowicz ever told him that he could see his parents or a lawyer. They never contacted his parents; nor did the Superintendent of the Children's Shelter. This was so although both the police and probation authorities knew that petitioner's mother was looking for him. He had been missing from home for a time prior to his arrest; his mother had called the probation department several times; she had called the police and gone to the police in person; and she had been told that he would be returned to her when found. In fact, she learned that he was in custody only after the newspapers reported that he had confessed.

Third, petitioner was never told that he had a right to remain silent, or to refuse to answer his interrogators' questions. See *Culombe* v. *Connecticut,* 367 U.S. 568 (1961); *Haynes* v. *Washington,* 373 U.S. 503 (1963); *Davis* v. *North Carolina,* 384 U.S. 737 (1966); *Clewis* v. *Texas,* 386 U.S. 707 (1967). Rather, repeated bouts of questioning proceeded on the premise that answers from him were demanded. We know that, on one occasion, he sat silent for at least five minutes, while Mr. Arther continued to question him. (See p. 29, *supra.*) Interrogation of this sort is eloquent that silence will not be accepted. It is true that, as in *Haley* v.

Ohio, 332 U.S. 596 (1948), petitioner was told, after he had twice confessed the Giambra attack orally but before his formal statement was taken, that the police were asking him to make a voluntary statement which he could make or not, as he pleased. See also *Greenwald* v. *Wisconsin*, 390 U.S. 519, 520 (1968). This Alice-in-Wonderland warning was obviously both too little and too late.

Fourth, on February 21 and again during hours of questioning on February 26, petitioner adamantly refused to admit his guilt in the face of repeated inquiries, accusations and "confrontations." See *Clewis* v. *Texas*, 386 U.S. 707 (1967). He finally admitted guilt in the Weiss assault, but told a factually inaccurate version of it. The police cross-questioned him on an aggravating detail—the use of a weapon—after brushing aside his inquiry whether that did not make the offense more serious. They did not cross-question him on his assertion, which the Weiss assailant must have known to be wrong, that he had taken a package from Miss Weiss. Within an hour, petitioner had recanted this confession in its entirety. So the interrogation resumed.

There followed denials, silence in the face of the Stopford confrontation, silence in the face of accusations by Arther, silence in the face of blandishment by DeSimone to "search his conscience," and then confession of the Giambra matter—again with significant factual inaccuracies. All of this twisting and turning, admission, retraction, re-admission, and finally confession which the juvenile court below found to be inaccurate in some details, paints an unmistakable picture of grudging submission under pressure. That is consistent also with DeSimone's description of this adolescent's "outbursts when we would confront him with things"

and his swings of mood: "then he would relax and be semi-cooperative and then he would get belligerent again and surly."

Behavior of this sort is obviously something other than "an essentially free and unconstrained choice" to confess. Simply, the boy resisted as long as his capacities allowed, and then he broke.

Fifth, his interrogation on February 26 would have been overpowering even to an adult. He was up for breakfast at 7:00 a.m.; questioning began at 10:00 a.m.; and his statements were completed fifteen hours later at 1:00 o'clock the next morning. During this entire time, he was in the presence of the interrogating detectives—usually two or three of them—and saw and spoke to no one else. He did not sleep at all, and had only one "rest" period, of forty minutes, during which an avowed halt was called to the investigation. His lunch and dinner were sandwiches, eight hours—that is, a full working day—apart.

During this fifteen-hour period, he was questioned, in familiar police terminology, "on and off." Two points emerge that pierce that rhetoric.

First, by the most conservative estimate of the police testimony, petitioner was actually being questioned for six and one half hours of the fifteen. This is twice as much interrogation as the total in *Haynes* v. *Washington*, 373 U.S. 503 (1963), and *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968), and twice as much as any single day's questioning in *Culombe* v. *Connecticut*, 367 U.S. 568 (1961).

Second, and more important, this record paints an extraordinarily vivid image of what is really involved in "in-

termittent" police interrogation. "On and off" suggests surcease and perhaps relaxation. But petitioner had nothing of the sort. His "off" periods brought him no relief from either police presence or police pressure.

During these intervals between episodes of questioning, he was never freed for one moment of the strains of the ongoing police effort to get him to confess. While the questioning was "off," he was waiting for the results of the polygraph examinations of Ogg and Stopford in the next room, or being "confronted" by them, or watching the detectives confer in whispered conversations preparatory to resuming their cross-questioning of him, or sitting in a corner with instructions to "search his conscience," or waiting for a stenographer to come to transcribe his incriminating statements. He was outside the doors of the two rooms where his inquisition occurred on only one occasion: for one hour while he drove with three detectives in a car to the scene of the Weiss assault for a reenactment.

In this context, we invite scrutiny of the Superior Court's conclusion that petitioner "was not subjected to long and gruelling interrogations by relays of police officers." (A. 227.) Unremitting involvement in fifteen hours of police investigation seems long enough; active interrogation during one and a half times the number of hours that this Court sits during any day seems gruelling enough; and "relays" has no meaning if it does not describe interrogation on the polygraph by Arther, then interrogation by DeSimone and Ventimiglia, re-interrogation by Arther, then again by the detectives. "Relay" questioning is an effective instrument of extracting a confession because it keeps the suspect off balance. Petitioner was in and out of the

anteroom, "on the machine" and off, confronted and questioned, all day. He could never know what to expect next. After DeSimone's "heart to heart" conversation with him, the detective told him that no one would question him while he sat and searched his conscience. Then DeSimone left and within a few minutes the boy was taken back into the anteroom and put on the polygraph.

The polygraph machine itself is not simply a background prop in these events. Although no description of the contraption appears in this record, its physical attributes are sufficiently well known so that the Court can notice them and take account of the impression they would create on a fifteen year-old boy. We are told by John E. Reid, Mr. Arther's employer, that:

> "... [t]he Reid Polygraph ... is essentially a pneumatically operated mechanical recorder of changes in blood pressure, pulse, and respiration, supplemented with a unit for recording the G.S.R. [galvanic skin reflex]. An additional unit permits a recording of certain muscular activity, in particular, muscular pressure exerted by the subject's forearms, thighs, or feet.
>
> "The Polygraph ... is attached in the following manner to the person being tested. A pneumograph tube, with the aid of a beaded chain, is fastened around the subject's chest or abdomen. A blood pressure cuff, of the type used by physicians, is fastened around one of the subject's arms. A set of electrodes is attached to the palmar and dorsal surfaces of the hand or fingers of the other arm. No attachments are required for the muscular activity recording unit." (Reid & Inbau, Truth and Deception: The Polygraph ("Lie-Detector") Technique, 4 (1966).)

A work by Mr. Reid's co-author describes the effect of the polygraph when it is used in conjunction with interrogation:

> "Although the psychological effect of the mere presence or use of a lie-detector is sometimes sufficient to induce a confession from a guilty subject, a period of skillful interrogation after the completion of the tests is usually required before a confession is forthcoming. The examiner's task in this respect is by no means a simple one. It usually requires considerable patience and effort, despite the assistance he derives from the psychological effect of the instrument itself." (INBAU, LIE DETECTION AND CRIMINAL INTERROGATION, 80 (2d ed. 1948).)

There is no question but that petitioner had the requisite skillful interrogation before his confession was forthcoming. He had the look-me-in-the-eye-Willy and the honest-men-look-each-other-in-the-eye-when-they-are-telling-the-truth treatment.[70] He had the you-can't-fool-God treatment.[71] He had the you'll-feel-better-if-you-tell-the-truth

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[70] "*(4) Inability to Look Interrogator 'Straight in the Eye'* . . . When a subject fails to look the interrogator 'straight in the eye,' . . . it is well to comment upon these characteristics as indications of a disturbed mental condition inconsistent with the subject's protestations of innocence." INBAU, LIE DETECTION AND CRIMINAL INTERROGATION, 110 (2d ed. 1948).

[71] "In playing upon this potential weakness, if the subject happens to be a religious person discuss with him the tenets of his particular creed. Mention to him the fact that his religion becomes meaningless unless he tells the truth with regard to the offense in question." *Id.*, at 118-19.

treatment[72] and the search-your-conscience treatment[73] (this latter from Jarmolowicz as well as DeSimone) and the I-only-want-the-truth treatment.[74] He had accusations based on prior admissions, on his lie detector responses, on the Ogg and Stopford stories.[75] He had confrontations with Ogg and Stopford. And he had periods of waiting, watching the detectives whispering across the room, watching them inspect an autopsy photograph of Miss Giambra's head. If these devices are the accouterments of an adolescent's "free and unconstrained choice" to confess, then neither the choice nor the Constitution that guarantees its freedom has much meaning.

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[72] "The expression 'It's the only decent and honorable thing to do' appears to constitute somewhat of a challenge for the offender to display some evidence of decency and honor." *Id.*, at 118.

[73] "3. *Urge the subject to tell the truth for the sake of his own conscience.* . . . In urging or advising an offender to tell the truth the interrogator must avoid expressions which the courts of his state may consider objectionable on the ground that they constitute illegal promises or threats. However, by speaking in generalities such as 'for the sake of your conscience,' . . . the interrogator can remain within permissible bounds." *Ibid.*

[74] "(1) The interrogator should avoid creating the impression that he is an investigator seeking a confession or conviction. It is far better for him to appear in the role of one who is merely seeking the *truth*." *Id.*, at 102 (emphasis in original).

[75] "A. *Display an Air of Confidence in the Subject's Guilt*

"By an 'air of confidence' we do not mean a supercilious or bullying attitude, but rather one which will convey to the subject the impression that the interrogator is 'sure of himself' and that he 'means business.' As part of this impression, of course, the interrogator must give no indication that he is being influenced by what the subject may state in behalf of his innocence; and this should be so even when the interrogator actually realizes the reasonable implication of possible innocence in some fact or evidence presented by the subject." *Id.*, at 108. Consider, in this connection, the detectives' failure to call to petitioner's attention the obvious incorrectness of his statement that he had taken a package from Miss Weiss.

Sixth, petitioner was deprived of the presence of any impartial witness to his confessions. He was thereby vitally handicapped in any effort to challenge either their content as reported by the police or the police version of the circumstances under which they were made. This kind of deprivation is, of course, one of the most damaging consequences of any practice of closed-door interrogation. See *Culombe* v. *Connecticut,* 367 U.S. 568, 574 (1961); *Gallegos* v. *Colorado,* 370 U.S. 49, 50-51 (1962); *Davis* v. *North Carolina,* 384 U.S. 737, 741 (1966). But its impact in petitioner's case was uncommonly harmful.

As we point out at pp. 12-13, *supra* and in Appendix B *infra,* there is not and has never been a respectable scintilla of non-confessional evidence identifying petitioner as the assailant in the Weiss and Giambra cases. This circumstance, coupled with New Jersey law's requirement of corroboration of confessions, made the details of petitioner's confessional statements absolutely vital to the prosecution's case. The Superior Court found sufficient "corroboration in the Giambra case" (A. 227) on the principal ground that petitioner's "knowledge of the particulars of each offense was too great to be mere guesswork or fantasy" (*ibid.;* see A. 227-228).

The details of petitioner's confessional statements which purportedly demonstrate his "knowledge of the particulars" are analyzed in Appendix C *infra.* Two vital details appear only in his oral statements. Other details do appear in the formal, transcribed confessions; but petitioner's testimony is hopelessly at odds with that of the police on the question whether knowledge of these details was volunteered by petitioner or communicated to him through the officers' questioning. On these decisive factual ques-

tions—whether he used certain phrases at all, and whether others were suggested to him by the interrogating detectives—the case boiled down to a swearing contest between petitioner and the police. It is striking and not a little sinister, therefore, that the court reporter summoned to transcribe petitioner's formal statements did not record them stenographically, but was specifically instructed by the detectives to type only the dictated questions and answers. No impartial witness was admitted into the interrogation chambers.

Probation Officer Jarmolowicz neither could nor did play the role of impartial witness. *Cf. In re Gault,* 387 U.S. 1, 35-36 (1967). By his own admission, he conceived that the substance of petitioner's conversations with the police was none of his business. Even as regards the circumstances of the confessions that were relevant to the question of their voluntariness, Jarmolowicz was persistently uninformed or heedless of the truth. (See pp. 50-52, *supra.*)

His participation in the process of the interrogation itself was equally unprotective. Never once did he restrain the police, intervene in petitioner's behalf, or signify in any way that he might or could do either of these things. What he did was, first, to "ask the boy that if he really knew anything about these offenses that he should unburden himself and search his conscience and that he would feel much better if he told it because he would have it to live with the rest of his life" (A. 90); and, second, to witness petitioner's confession. If he was on the premises to protect petitioner, petitioner knew and was told nothing of it. We think it obvious that the point would not have been inferable from Jarmolowicz' behavior.

Finally, this is a classic case of a trial reduced to an appeal from the police station. There is no mistaking the purpose of the formal, signed confessions taken from petitioner between 10:45 p.m., February 26, and 1:00 a.m., February 27, or of the reenactments later on the morning of the 27th.[76] These were carefully directed, elaborately staged evidence productions. They were in no sense investigatory, or any part of the police function of crime detection. They were not designed to clear a crime, identify a criminal, understand a criminal technique, or even puzzle out the fine details of *modus* of an incompletely understood offense. "It was all clear to us," said DeSimone. "We had gone over that time and time again." (A. 152.) This time the questioning was purely testimonial, its goal: the extraction of incriminating depositions.

We submit that the confessions and reenactments so extracted were inadmissible against petitioner consistently with due process of law. That is no novel submission. Rather, as we have said, *Haley* v. *Ohio,* 332 U.S. 596, decided in 1948, squarely controls it. Cognizant of the point that Fourteenth Amendment adjudication in confession cases "requires more than a mere color-matching of cases," *Reck* v. *Pate,* 367 U.S. 433, 442 (1961), we have discussed petitioner's case on its own bottom. But having done so, we must conclude that every aggravating incident of Haley's interrogation was mirrored in petitioner's treatment by the Paterson police; while petitioner's case also presents coercive incidents—ten days of detention without

[76] We think that nothing more needs be said regarding these reenactments. If petitioner's formal statements on the night of the 26th-27th were involuntary, so were the reenactments the next morning. See *Reck* v. *Pate,* 367 U.S. 433 (1961); *Clewis* v. *Texas,* 386 U.S. 707 (1967).

access to a friendly presence, use of the polygraph machine, admonitions to "search your conscience," among others—which make Haley's ordeal seem mild by comparison.[77] With all due respect to the courts below, their approval of the methods by which petitioner's incriminating statements were taken is an incomprehensible regression to the era of the third-degree. This Court must reverse the judgment of the Superior Court or turn the clock back twenty years.

II.

Petitioner's Sentence of Imprisonment for the Maximum Term of His Life, Based Upon Factual Determinations Made in His Absence and Without Personal Notice or Hearing, Deprives Him of His Liberty Without Due Process of Law.

Petitioner was tried in December, 1957 on allegations that he was "a delinquent child, in that . . ., while in the commission of an assault and robbery, he struck Giovanna Giambra . . . on the head, with a blunt instrument on repeated occasions, which resulted in her death." (A. 3.) Under the prevailing New Jersey law, it made no difference whether this was a charge of first degree murder, second degree murder, robbery, aggravated assault, or some lesser offense included within one of these; and at his trial it made no difference which offense was shown. Proof of

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[77] Petitioner's case is far more extreme than *Gallegos* v. *Colorado*, 370 U.S. 49 (1962), in which this Court also held an adolescent's confession involuntary. Gallegos was not subjected to petitioner's fifteen-hour inquisition or any of its coercive incidents; he was advised of his constitutional rights; and his mother was aware that he was in custody. Most important, Gallegos confessed immediately at the time when he was taken into custody, while petitioner persisted in denying guilt until interrogation wore him down.

any crime by a juvenile would support an adjudication of delinquency; and upon *any* adjudication of delinquency the juvenile could be committed for an indeterminate term—that is, for life imprisonment, subject to release at the discretion of the parole board. (See pp. 5-6, *supra*.) Accordingly, no issue was litigated or determined at petitioner's trial with regard to the nature of the specific offense involved in the Giambra matter.

In January, 1958, just that issue became determinative of whether petitioner could legally be confined for a maximum term of five years or for a maximum term of his natural life. Legislation enacted on January 6 provided that juvenile commitments should not extend beyond a juvenile's twenty-first birthday, except in homicide cases. In such cases, where "the adjudication of delinquency [was] . . . predicated upon an offense which, if committed by a person 18 years or over, would constitute any form of homicide," the maximum term of confinement was to be the maximum fixed by law for the offense. (See N.J.S.A., § 2A:4-37 (1969 Cum. Supp.), pp. 79-80, *infra*.) This was a life term for first degree murder. (See N.J.S.A., § 2A:113-4 (1953), p. 80, *infra*.) The new statute was retroactive. *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959).[78]

Accordingly, the Superintendent of the Reformatory to which petitioner had been committed asked the committing court to determine "'what crime was committed . . . in order to assist . . . in fixing his maximum sentence.'" (A.

[78] More exactly, *Smigelski* held the statute retroactive at the option of the juvenile. But, for the reasons stated in *In re State in the Interest of Steenback*, 34 N.J. 89, 99-101, 167 A.2d 397, 402-403 (1961), no juvenile could rationally opt *not* to have the statute retroactively applied to him.

221.) After conferring with court-appointed trial counsel, but without personal notice to petitioner and in his absence, the juvenile court determined that the Giambra offense was first degree murder. (A. 222; see p. 9, *supra*.) We submit that such a determination deprived the petitioner of the balance of his sixteen year-old life without due process of law.[79]

The basis of this submission is the fundamental proposition that "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). This Court has recently held that proposition applicable to sentencing, and has held that when a convicted man is brought before the court for a determination of sentence depending upon "a new finding of fact . . . that was not an ingredient of the offense charged," *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967), "[d]ue process requires that he be present with counsel, have an opportunity to be heard, . . . and to offer evidence of his own" (*id.*, at 610). The same holding is implied, at the least, in *United States* v. *Behrens*, 375 U.S. 162 (1963).[80]

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[79] This issue was not raised in these terms below. But petitioner's counsel did put the legality of petitioner's present life sentence in issue in the Superior Court, and that court expressly ruled not merely that the sentence was legal, but that it was constitutional as against an *ex post facto* objection. (A. 229; see pp. 10-11, *supra*.) Petitioner's present formulation of the claim—that the retroactive application of the statute without a hearing on the factual issues raised by such an application, violated due process—is sufficiently akin to the *ex post facto* argument that we think this Court can properly hear it.

[80] Although *Behrens* relies upon the Federal Criminal Rules in condemning sentencing *in absentia* and without a fair opportunity

Here, a "new finding of fact" was obviously called for as the basis of petitioner's sentence to life imprisonment. That finding was his guilt of the crime of first degree murder, a question never previously in issue in his case. Under New Jersey law, it is plain that petitioner might have raised factual defenses against a first-degree murder charge that were not available to him as against the other charges which might equally have supported his adjudication of delinquency and life sentence under pre-January-1968 law. The most significant of these was a contention of diminished capacity,[21] based on psychiatric evidence.[22] Since peti-

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to be heard, there are several indications in the Court's opinion that its decision has constitutional underpinnings. First, it recites that the rights it is vindicating are "recognized" by the Rules, rather than created by them. (*Id.*, at 165.) Second, it points out that any other construction of the applicable Rules and statutes would "make necessary a constitutional decision" (*id.*, at 166 n. 4) whose consequence is hardly left to the imagination. Third, it appears to approve the decision below (*id.*, at 164), in *Behrens* v. *United States*, 312 F.2d 223 (7th Cir. 1962), which rests on constitutional grounds.

[21] New Jersey law recognizes that psychiatric states which render a defendant incapable of the thought processes implied by the mental elements of particular offenses may be shown as a basis for finding the defendant not guilty of those offenses. *E.g.*, *State* v. *Di Paolo*, 34 N.J. 279, 168 A.2d 401 (1961); *State* v. *Vigliano*, 43 N.J. 44, 202 A.2d 657 (1964); *State* v. *Conforti*, 53 N.J. 239, 250 A.2d 6 (1969) (per curiam). Indeed, the same rule applies with regard to intoxication, *e.g.*, *State* v. *Wolak*, 26 N.J. 464, 140 A.2d 385 (1958), or "any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether [the required] . . . mental operations did *in fact* occur . . . ." *State* v. *Di Paolo*, *supra*, 168 A.2d at 409 (emphasis in original). And the rule applies to felony-murder cases, *State* v. *Sinclair*, 49 N.J. 525, 231 A.2d 565, 575 (1967), at least where the underlying felony is one—like robbery in *Sinclair* and allegedly in petitioner's case—which requires a specific mental state. On the other hand, as the cited cases indicate, petitioner could not have defended against a

tioner's mental state became an issue only with the passage of the 1968 enactment—and since it became determinative of the difference between a five-year commitment and a life commitment—he was entitled by due process to a hearing on that issue. *Cf. Panico* v. *United States*, 375 U.S. 29 (1963).

We think it can make no difference that the "new finding of fact" was required by new and ameliorative legislation which New Jersey chose to make available retroactively for the benefit of pre-1968 juvenile committees—except first degree murder committees. For present purposes, one may assume that New Jersey was not required to enact the statute or to give it retroactive application.[82] But when it did do these things, New Jersey thereby required a differentiation to be made between first degree murder cases and others; and a differentiation of this sort, involving new factual findings and entailing consequences of the most extreme sort, can hardly be thought to be exempt from the due process requirement of fundamental fairness. *Cf. Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).

The elements of that requirement for a determination of this sort are spelled out in *Specht*, *supra*, and include, at the least, notice and the rights to be present and to be

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second degree murder charge—hence an adjudication of delinquency—on this ground.

[82] In its adjudication of delinquency and commitment, the juvenile court recommended psychiatric treatment for the petitioner. (A. 218, 219.)

[83] This assumption ignores the obvious federal constitutional claims available to a juvenile committed for a life term without regard to the nature of his offense.

heard. Because petitioner was not accorded these rights,[84] his present sentence of life imprisonment denies him due process of law.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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Counsel for Petitioner
Appointed by the Court

Of Counsel:

MICHAEL MELTSNER

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[84] These are not the sort of rights that petitioner's counsel could waive in his absence and without personal notice to him. See *Brookhart* v. *Janis*, 384 U.S. 1 (1966).

APPENDICES

APPENDIX A

Statutes Involved

N.J.S.A., § 2A:4-14 (1952)

2A:4-14. *Exclusive jurisdiction; juvenile delinquency defined; habitual offenders of the age of 16 and 17 years*

Except as stated in section 2A:4-15 of this title, the juvenile and domestic relations court shall have exclusive jurisdiction to hear and determine all cases of juvenile delinquency.

Juvenile delinquency is hereby defined as the commission by a child under 18 years of age

(1) of any act which when committed by a person of the age of 18 years or over would constitute:

a. A felony, high misdemeanor, misdemeanor, or other offense, or

b. The violation of any penal law or municipal ordinance, or

c. Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding, or

d. Being a disorderly person,

or (2) of the following acts:

e. Habitual vagrancy, or

f. Incorrigibility, or

g. Immorality, or

h. Knowingly associating with thieves or vicious or immoral persons, or

i. Growing up in idleness or delinquency, or

j. Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of law, or

k. Idly roaming the streets at night, or

l. Habitual truancy from school, or

m. Deportment endangering the morals, health or general welfare of said child.

But the commission of an act which constitutes a violation of the provisions of chapters 3 or 4 of Title 39, Motor Vehicles, of the Revised Statutes, or of any amendment or supplement thereof, by a child of or over the age of 17 years, who is the holder of a valid license to operate a motor vehicle under the laws of this or any other state, shall not constitute juvenile delinquency as defined in this section.

N.J.S.A., § 2A:4-37 (1952)

[in force prior to January 6, 1958]

2A:4-37. *Disposition of juvenile offender*

The juvenile and domestic relations court on proper cause shown may:

a. Place the child on probation to the chief probation officer of the county upon such terms as the court may deem to be to the best interest of the child; or

b. Commit the child (1) to a public institution established for the care, custody, instruction and reform of juvenile offenders or to any other appropriate institution which is maintained by the state or the county or by any county or municipality in which the child shall reside or have a settlement; (2) to any other like institution, commitment to which may be authorized by law; (3) to the care, custody and control of the state board of child welfare, such commitment to have the same force and effect as a

commitment made to it under the provisions of chapter 138, of the Laws of 1951 (C. 30:4c-1 to 30:4c-40).

N.J.S.A., § 2A:4-37 (1969 Cum. Supp.)

[reflecting the amendment effective January 6, 1958, N. J. Laws, 1957, ch. 220, p. 765, § 1]

2A:4-37. *Disposition of juvenile offender*

The juvenile and domestic relations court on proper cause shown may:

a. Place the child on probation to the chief probation officer of the county upon such terms as the court may deem to be to the best interest of the child; or

b. Commit the child (1) to a public institution established for the care, custody, instruction and reform of juvenile offenders or to any other appropriate institution which is maintained by the State or the county or by any county or municipality in which the child shall reside or have a settlement; (2) to any other like institution, commitment to which may be authorized by law; provided, however, that the time which any such child shall serve in confinement or on parole shall not extend beyond that date upon which the child attains the age of 21 years, except, that if the adjudication of juvenile delinquency is predicated upon an offense which, if committed by a person of the age of 18 years or over, would constitute any form of homicide as defined in sections 2A:113-1, 2A:113-2, 2A:113-4 and 2A:113-5 of the New Jersey Statutes then the period of confinement shall be indeterminate and shall continue until the appropriate paroling authority determines that such person should be paroled, but in such case the period of confinement and parole shall not exceed the maximum provided by law for such offense if committed by a person of the age of 18 years or over; (3) to the care, custody and control of the State Board of Child Welfare, such commitment to have the same force and effect as a commitment

made to it under the provisions of chapter 138, of the laws of 1951 (C. 30:4c-1 to 30:4c-40).

N.J.S.A., § 2A:113-4 (1953)

2A:113-4. *Murder; punishment*

Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

APPENDIX B

Summary of All Non-Confessional Evidence on the Issue of Petitioner's Identity as the Assailant in the Weiss and Giambra Matters

A. *Weiss Assault*

With regard to the Weiss assault, only one piece of non-confessional evidence points even vaguely in petitioner's direction. It was snowing lightly on the night of February 24, and an officer responding to the scene about a half hour after Miss Weiss was attacked found a set of footprints leading south from the place of the attack to the rear porch of a boarding house several blocks away, on the corner of 31st Street and 15th Avenue. (Tr. I, 62-64, 69-74.) One Robert Stopford, a sixteen-year-old friend of the petitioner (Tr. I, 30-31), testified that he had several times gone with petitioner to a first-floor bathroom in a boarding house at 31st Street and 15th Avenue. (Tr. I, 41, 48.) On one occasion, sometime in 1956, petitioner took Stopford to the boarding-house bathroom for the purpose of examining the contents of a purse that petitioner found in a back yard, and of dividing the money found in it. (Tr. I, 37-43.) This purse, the prosecution conceded, had nothing to do with the Weiss or Giambra case. (Tr. I, 42.) And the boarding house was in petitioner's neighborhood, within several blocks of his home. (See Tr. III, 170.)

The investigating officer never went north of the site of the assault, and so could not say whether the footprints he followed originated at that site or came through it before or after the time when Miss Weiss was attacked. (Tr. I, 70-71.) But, quite without regard to this problem, the entire line of evidence does not approach legally sufficient or rationally persuasive proof of petitioner's identity as the assailant of Miss Weiss.

B. *Giambra Assault*

In the Giambra matter, the non-confessional evidence of identity is slighter still. It consists of two pieces of proof. First, petitioner left his home sometime after 7:00 p.m. on the night of November 12, 1956 (A. 164; Tr. I, 66-67; III, 190-192.) Second, Miss Giambra described her assailant as wearing a dark leather jacket (Tr. III, 42); and petitioner owned a black leather jacket (Exhibit S-28).

This last aspect of the prosecutor's case is troubling in several regards. The investigating officer's trial testimony is that Miss Giambra spoke of a "dark" leather jacket, but the officer found himself tending to call it "brown" (See Tr. III, 42-43) because someone else told him that Miss Giambra had said "brown" (Tr. III, 45-46). And shortly after the Giambra attack, another officer had been at petitioner's house inquiring about a *brown* leather jacket. (Tr. I, 67.) Petitioner's black jacket was examined at the police lab (Tr. III, 70), but no scientific evidence was presented linking it to the Giambra offense or to any other. Because the jacket was found at petitioner's house by an officer whom petitioner had directed to go there after petitioner completed his confessional statements (A. 155-156), the admissibility of the jacket would seem to stand or fall upon the voluntariness of the confessions. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963). But even if the evidence concerning the jacket were considered independent of the confessions and given it's utmost probative value, the prosecution's total non-confessional proof of petitioner's identity as the Giambra assailant remains so thin as to be legally and logically non-existent.

APPENDIX C

Summary of All Evidence of Confessions or Admissions by the Petitioner, Other Than the Confessions in Controversy*

A. *Weiss Assault*

1. One Harry T. Ogg, a seventeen year-old neighborhood friend of the petitioner (Tr. I, 15-18), testified that on a date which Ogg could not fix (Tr. I, 16, 19-20, 26-28), but which was the day following the assault on Miss Weiss (Tr. I, 16), petitioner discussed that assault with Ogg. Petitioner had told Ogg that he had snatched a purse; Ogg, while in a candy store with petitioner, saw a newspaper account of the Weiss affair; Ogg showed it to petitioner, who said "that is the one . . . he had taken" (Tr. I, 16). (Tr. I, 16-18.) Ogg told no one about this confession (Tr. I, 18-19), until he himself was later picked up and questioned by the police. (See p. 22, *supra*.) His trial testimony concerning it was fuzzy as to time and circumstances. (See Tr. I, 19-28.) A police officer, describing a police-arranged confrontation of petitioner with Ogg following petitioner's arrest, testified that Ogg said "Monks had told Ogg, if my memory is correct, and he even showed him some money, showed him some dollar bills." (A. 80.) Ogg's trial testimony makes no reference to this obviously salient point of a money display. And petitioner, at trial, denied making any confession at all to Ogg. (A. 190.)

2. Robert Stopford, a sixteen year-old neighborhood friend of the petitioner (Tr. I, 30-31), talked to petitioner a week after the Weiss assault (Tr. I, 31). Stopford was first incorrect and then fuzzy in dating this conversation. (Tr. I, 32-35.) Stopford said to petitioner "'Did you do

* The several confessions in controversy are enumerated at p. 13, *supra*.

that?' and he says, 'Yes.' I said, 'What did you do that for?' He says, 'I needed money,' and I says, 'What did you hit her with?' he says, 'A pipe.'" (Tr. I, 34.) Stopford meant to refer to the Weiss assault, but did not mention Miss Weiss in any way to petitioner; he asked only, "Did you do that?" (Tr. I, 35-36.) Stopford denied that petitioner was given to bragging, but admitted that he wanted to be a good fellow with the boys and talked about his exploits. (Tr. I, 40.) Petitioner also denied at trial having made any such admission to Stopford. (A. 180.)

B. *Grambera Assault*

1. After petitioner's arrest and during his investigation by police over a period of two weeks (see pp. 15-34, *supra*), he was detained in the Children's Shelter. One Richard Tallon was also an inmate of the Shelter at this time. (Tr. III, 28.) Tallon talked with petitioner in the shower room and asked him what the lie detector said. Petitioner "say it say yeah." (Tr. III, 28.) Tallon then asked petitioner if he really did it and petitioner replied "Yeah, man." (Tr. III, 28-29.) Tallon asked how he did it and petitioner "said he hit her with the pipe and took her pocket book, and she went to raise her hand and he thought she was waving at somebody and he hit her again." (Tr. III, 29.)

The date of this exchange is not clear. Tallon put it near the end of February. (Tr. III, 32, 36.) He first said he thought it was "after the first lie detector test" of petitioner (Tr. III, 28), but later said it was "the first lie detector admitted to this" (Tr. 37). Petitioner made no admissions in his first polygraph examination, February 21, 1957. His admissions came on February 26, the day that ended with the transcription of his formal confessions. Between the time of his admissions to the polygraph operator and the time of his formal confessions, petitioner was not returned to the Children's Shelter. Petitioner himself testified that his conversation with Tallon was after his formal confessions came to the police. (A. 188.) "Before I signed this here

confession. I told them I didn't do it, and after I signed it, I told them I did it. Q. Why did you tell them you did it if you didn't do it? A. I told everybody else I did it." (A. 171.) Obviously, on this record, the Fallon statement has not been shown to have been independent of petitioner's challenged confessions to the police.

2. As indicated at pp. 31-32, *supra*, petitioner signed formal confessions of the Weiss and Giambra assaults on the night of February 26, 1957. Shortly after 1:00 p.m., on February 28, petitioner was visited at the Children's Shelter by his mother and sister. (Tr. III, 72-73.) His mother asked him: "Billy, did you do this terrible thing?", and he nodded affirmatively. (Tr. III, 73.) His mother asked "Why did you do this?" and he shook his head as though he didn't know. (Tr. III, 73-74.) Asked at trial why he nodded when his mother asked whether he was guilty, petitioner testified: "Well, what could she do. I already signed the confession." (A. 170.)

This was the same answer given by petitioner when he was asked why he did not deny guilt during the reenactments of February 27. "I already told them. I already signed a confession. Q. Well, the next day Mr. Jarmolowicz was along, was he not, when you went around showing the investigators? A. What could he do. I signed a confession." (A. 169.)

3. On February 28, March 1 and March 2, 1957, petitioner had conversations with the police officers to whom he had made his formal confessions of February 26-27. These conversations concerned the nature of the weapon used by petitioner and his method of disposal of it and of a pocketbook. (A. 114-116, 125-126.) Petitioner's admissions at this time were fragmentary and have meaning only in the context of his earlier full and detailed confessional statements, of which the conversations between February 28 and March 2 are plainly declarative.

APPENDIX D

Description of Each Aspect in Which Petitioner's Confessions Are Consistent With the Material Circumstances of the Offenses

A. Weiss Assault

1. Petitioner said that it was snowing on the night of the Weiss assault. (A. 13, 72, 73, 108.) It was. (Tr. I, 62, 69.) But the police knew this fact at the time that they interrogated petitioner. (See A. 127.).

2. Petitioner said that he crossed the street diagonally in coming up behind Miss Weiss. (A. 14-15, 17, 66.) This conforms to Miss Weiss' description of the fashion in which she was approached by her assailant. (Tr. I, 49, 52-54.) But she had given that description to the police long before petitioner was interrogated. (Tr. I, 56.) Significantly, the term "diagonally" appears only in the police recitations of petitioner's oral confessions, where it may be a police interpretation of what petitioner said rather than anything he actually said. His formal confession conveys no notion that his approach to Miss Weiss was diagonal. (A. 102.)

3. Petitioner said that, after snatching the Weiss' pocketbook, he took it to the first floor bathroom of a boarding house at 33rd Street and 10th Avenue, entering the house by the rear door. (A. 15, 17, 107.) He identified the boarding house as one to which he had previously gone with Robert Stopford; and he said that, on one occasion, he and Stopford had gone into the bathroom to divide money from a purse. (A. 102.) As indicated in Appendix B, *supra*, Stopford testified that he had indeed gone to a bathroom in a boarding house at that intersection with the petitioner on several occasions. (Tr. I, 37-43, 48), although his account of the proceeds from the purse differs markedly

from petitioner's (Tr. I, 43; A. 109). And a police officer investigating the Weiss attack found footprints leading from the scene of the attack to the same house. (Tr. I, 62-64, 69-74.) But again, one of the officers who took petitioner's confession conceded that petitioner might have been told about the footprints before he confessed. (A. 127.)

4. Petitioner identified, from among a number of pocketbooks, one that he said he had taken from Miss Weiss. (A. 16; see also A. 108.) This was a pocketbook that Miss Weiss had purchased after the attack, which she testified was identical to the one taken in the attack, and which she had turned over to detectives from the prosecutor's office at the time of petitioner's interrogation. (Tr. I, 50-52.)

5. Petitioner, enumerating the contents of the Weiss pocketbook, mentioned a number of items (wallet, pen and pencil set, pill box, wrist watch, mirror, compact) (A. 16, 108) of sorts that Miss Weiss testified were in fact in the pocketbook taken from her (Tr. I, 51-52, 55). Miss Weiss had given a list of these items to the police immediately following the attack (Tr. I, 55-56), and that list was known to the officers who questioned petitioner (A. 76). One interrogating officer admitted raising the subject of the pill box with petitioner (A. 16, 76, 83), but asserted that neither he nor anyone else had divulged to petitioner the nature of the other contents of the pocketbook (A. 16). Interestingly, the transcript of petitioner's formal confession includes this question and answer: "Question: Did you notice a mirror, compact, handkerchief and other such things in the purse? Answer: Yes." (A. 108.) No such items are included in Miss Weiss' description of the contents of her purse. (Tr. I, 51-52.)

B. *Giambra Assault*

1. Petitioner's confessions place the Giambra assault (A. 111-114, 132-133) in approximately the location where Miss Giambra's body was in fact found (Tr. III, 38-40, 47-48,

85-86). However, the police admitted that there had been considerable newspaper publicity given to the Giambra affair, with descriptions and photographs of the location of the body. (A. 139-140.) Also, there were bloodstains on the spot for about a week, which might have been observed by anyone, like petitioner, living in the neighborhood. (A. 141.) (Petitioner testified that, after reading the newspaper accounts, he did go to the scene of the assault and could see where Miss Giambra had fallen. (Tr. III, 120-121.)) And see Appendix E, para. B(1) *infra*.

2. Petitioner's confessions recited that, immediately after the Giambra attack he saw and ran away from a crowd of people near 14th Avenue and 33rd Street. (A. 20, 138.) There were in fact numbers of persons coming and going in this area between 8:15 and 8:30 p.m. on the relevant night. (Tr. III, 89.) But again (as in para. A(2), *supra*), the significant corroborating detail appears only in the police versions of petitioner's oral confessions, where it may be an interpretative interpolation. Petitioner's signed confession says only that he "saw people," not a "crowd" or "a lot of people," in the area. (A. 112.)

3. Petitioner's confession described the pocketbook that he took from Miss Giambra as black leather, with handles and a big gold emblem. (A. 112.) This description substantially matches the bag that Miss Giambra must have carried on the night of the assault. (Tr. III, 97-98.) But, of course, the police would have had a description of the bag as well.*

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* The record is silent on this point. But, in view of routine police investigative methods in cases involving the theft of property, it is inconceivable that the interrogating detectives would not have had, three months after the offense, an exact description of the pocketbook.

APPENDIX E

Description of the Inconsistencies and Factual Discrepancies Found in Petitioner's Confessions

A. *Weiss Assault*

1. Throughout his several confessions, petitioner insisted that he had taken not only Miss Weiss' pocketbook but also a package that she was carrying. He described this package (A. 108) and said that he had buried it in a garbage container. (A. 15-16, 17, 46, 75, 108, 118.) In fact, as the police conceded (A. 15, 75, 118) the only package that Miss Weiss was carrying in addition to her pocketbook was never taken by her assailant (Tr. 1, 50, 60-61).

2. When petitioner first confessed to the Weiss assault, at 4:30 p.m., February 26, 1957, he said that he had hit Miss Weiss with a lead pipe, two feet long and 1½ inches wide (A. 15, 74) which he described as circular (A. 118). Later that night (A. 74-75), he said that the weapon was a different sort of instrument (*ibid.*), a perforated I-beam (A. 75). Petitioner's formal confession, late at night on February 26, describes the weapon as a piece of lead pipe, about two feet long, shaped like a cigarette pack, with holes in it. (A. 107.) On February 28, petitioner again described the weapon as an I-beam (A. 115); and on March 1 he drew a diagram of it in that shape (A. 115-116; Exhibit S-20). Exhaustive police searches failed to locate either the weapon (or weapons) used in the Weiss and Giambra assaults or any piece of metal like the ones petitioner described. (A. 116-117.)

3. In petitioner's first confession, at 4:30 p.m. on February 26, he said that he discarded the pipe used in the Weiss assault at the rear of the boarding house at 31st Street and 15th Avenue. (A. 15, 66, 76.) He stuck to this

story during a reenactment immediately following that confession. (A. 17-18.) However, later that evening, he changed his story. (A. 66.) His new version was that he buried the weapon after the Weiss attack, dug it up and used it in the Giambra attack nine months later, and then threw it in the river. (A. 66, 76, 107, 111-112, 131, 134.) Still later, he changed his story again. See para. B(3) *infra*.

4. In petitioner's first confession, also, he claimed that he had buried the Weiss bag in a plot of ground on 26th Street. (A. 18, 123-124.) His formal confession late the same night relates that he disposed of the bag in a garbage container at the rear of the boarding house at 31st Street and 15th Avenue. (A. 108-109.)

B. *Giambra Assault*

1. Petitioner's confessions relative to the Giambra attack recite that he first saw Miss Giambra walking up Wall Avenue sometime after 8:00 p.m. (A. 111, 132-133.) In fact, Miss Giambra left her house shortly after 8:00 p.m. that night to go to a church meeting (Tr. II, 287-291), and she was attacked and killed in the vicinity of a church near the spot where petitioner said he first saw her (Tr. III, 38-40, 47-48, 85-86). But, whether she walked or took a bus from her home to the church, no direct route from her starting point to her destination would have brought her up the street where petitioner claims he saw her walking. (A. 144-145.) Coming from Miss Giambra's house, Wall Avenue lay beyond the two entrances to the church which were open for the purpose of the meeting she was attending. (A. 145.)

2. Petitioner's version of the assault is that when Miss Giambra saw him approach her, she ran; he chased and caught her, then struck her. (A. 111-112, 133, 137.) As his confessions describe the event, she would have run at least 20 or 30 yards after seeing him. (A. 145-146; Tr. III, 125.)

But her version of the attack was simply: " 'He was following me. I heard footsteps, turned around, saw a man with a dark leather jacket on and he struck me.' " (Tr. III, 42.)

3. In his confessions of February 26 and reenactment of February 27 relative to the Giambra attack, petitioner said that he disposed of both the Giambra pocketbook and the weapon used in the Giambra assault by throwing them in the river. (A. 20-21, 112, 125.) On March 2, petitioner came up with a new story regarding the weapon: he first discarded it at the base of an umbrella-shaped tree in the park; then, two days later, retrieved it and threw it away in the same garbage container—behind the boarding house at 31st Street and 15th Avenue—where he threw the Weiss purse. (A. 125-126, 132.) This story cannot be considered a return to the version that he discarded the weapon at the rear of the boarding house following the Weiss attack and hence nine months before the Giambra attack. (See para. A(3) *supra*.) That version recited that he threw the weapon into a hedge in the boarding-house yard (A. 17-18), not into the garbage can.